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No. 96-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

DANIEL M. PARADIES, THE PARADIES SHOPS, INC., PARADIES MIDFIELD CORPORATION,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether 18 U.S.C. § 1346 provides the clear statement that this Court required in *McNally v. United States*, 483 U.S. 350 (1987), before the federal mail and wire fraud statutes may be used to "set[ ] standards of disclosure and good government for local and state officials."

2. Whether this Court's decision in *Tome v. United States*, 115 S.Ct. 696 (1995) — which holds that a witness's prior consistent statements made after a motive to lie arose are not admissible for their truth — may be circumvented by admitting such statements to "rehabilitate" the witness, whether or not any instruction was given limiting the jury's consideration of the statements to that purpose.

PARTIES TO THE PROCEEDINGS

The parties to the proceeding in the United States Court of Appeals for the Eleventh Circuit were defendants-appellants Daniel M. Paradies, The Paradies Shops, Inc., Paradies Midfield Corporation, and Ira Jackson, and plaintiff-appellee the United States.

The Paradies Shops, Inc. has the following non-wholly owned subsidiaries:

Concessions II Arch
Denver Paradies J-V
D & J Investments
Paradies & Associates, L.L.C.
Paradies-Annette
Paradies-Chicago
Paradies-Dayton
Paradies-Daytona Beach
Paradies-Desert House
Paradies-Ft. Lauderdale
Paradies-Hartford
Paradies-Houston
Paradies-Huntsville
Paradies-Jacksonville
Paradies-Knoxville
Paradies-LaGuardia
Paradies-Louisville
Paradies-Madison
Paradies-Metro Ventures
Paradies Midfield Corporation
Paradies-New Orleans
Paradies-Orange County
Paradies-Phoenix Joint Venture
Paradies-Phoenix, L.L.C.
Paradies-Pugh
Paradies-Sarasota
Paradies-South
Paradies-Toronto
Paradies-Vancouver
PAS of Texas
PAS Group
PGA Tour Licensing
Senses Joint Venture
Mercado Gifts - TPS

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PETITION FOR A WRIT OF CERTIORARI

Daniel M. Paradies, The Paradies Shops, Inc., and Paradies Midfield Corporation respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 98 F.3d 1266 (11th Cir. 1996). The opinion is reprinted at pages 1a-48a of the appendix to this petition.

JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on September 23, 1996. A timely petition for rehearing with a suggestion for rehearing en banc was denied on December 26, 1996. On January 22, 1997, the court of appeals entered an order staying the issuance of its mandate pending the filing of this petition for a writ of certiorari. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The statutory provisions at issue are 18 U.S.C. §§ 1341, 1346, which are reprinted in the appendix to this petition at page 52a.

STATEMENT

This case presents two questions of exceptional importance. The first is whether 18 U.S.C. § 1346 may properly be construed to make federal crimes out of all manner of dishonesty by state and local officials, notwithstanding Congress's failure to state with the clarity required by *McNally v. United States*, 483 U.S. 350 (1987), whether it intended to intrude into what has traditionally been the domain of state and local governments. The second is whether this Court's decision in *Tome v. United States*, 115 S. Ct. 696 (1995) — which holds that a witness's prior consistent statements made after a motive to lie arose are not admissible for their truth — may be circumvented by allowing such statements to be admitted to "rehabilitate" the witness. This

second question implicates conflicts among the circuits on two interrelated issues.

* * *

The Paradies Shops, Inc., and Paradies Midfield Corporation (collectively, "the Paradies Companies") and their president, Daniel M. Paradies, are in the airport gift shop business. App. 3a. Mr. Paradies began the business in 1960 with one shop in the Atlanta airport. Paradies Shops holds interests in airport gift shops nationwide, both directly and through affiliated companies, including a 65% interest in Paradies Midfield, an operator of gift shops in Atlanta's Hartsfield International Airport. *Id.*

The City of Atlanta owns and operates Hartsfield Airport. App. 3a. The City does not contract directly with the various retail establishments that do business at Hartsfield. Rather, the City has entered into a single contract with a principal airport concessionaire, which, in turn, has entered into separate contracts with subconcessionaires for various airport services. *Id.* In 1979, the principal concessionaire granted Paradies Midfield the exclusive right to operate gift shops at Hartsfield. *Id.*

The City required that subconcessionaires be owned, at least in part, by members of minority groups. *Id.* Thus, in addition to Paradies Shops, Paradies Midfield had three other investors, minority-owned corporations that together held 35% of its stock. *Id.* These minority investors also entered into management agreements with Paradies Midfield that entitled them to management fees based on the company's gross receipts. App. 3a-4a.

Between 1985 and 1988, Ira Jackson, a member of the Atlanta City Council, acquired a beneficial interest in these minority-owned corporations, and thus in Paradies Midfield, through a complex series of transactions. App. 4a-8a. Mr. Jackson submitted the first of these transactions — his wife's acquisition of one of the minority-owned shareholders of Paradies Midfield — to the Atlanta Ethics Board for its approval. The Ethics Board disapproved the transaction in a confidential

decision, which was not disclosed to Mr. Paradies or to the Paradies Companies. App. 6a. Mr. Jackson nonetheless persisted through other means to acquire a beneficial interest in the minority-owned shareholders and, thus, in Paradies Midfield. He did not inform the Ethics Board of these further activities. App. 10a.

From 1985 until 1992, first as a member of the Atlanta City Council and then as the City's Commissioner of Aviation, Mr. Jackson took positions favorable to the airport subconcessionaires, including Paradies Midfield, in their dealings with the principal concessionaire and the City. App. 10a-11a. In 1987 and 1989, for example, Mr. Jackson supported rent reductions for the subconcessionaires, including Paradies Midfield. App. 10a. As Commissioner of Aviation, Mr. Jackson sought to persuade the City Council and the Mayor to have the City enter into contracts directly with the subconcessionaires, thereby eliminating the principal concessionaire. App. 10a-11a. During the debate over this issue, Mr. Jackson's interest in Paradies Midfield was discovered, and he resigned from office. App. 11a.

This case also involved a separate series of dealings among airport subconcessionaires and City officials. Harold Echols, another Hartsfield subconcessionaire, frequently held breakfast meetings with Atlanta City Council members, which ended with his giving them cash. App. 12a. The government contended that Mr. Echols made certain of these payments on behalf of Mr. Paradies, who allegedly reimbursed Mr. Echols for the payments. *Id.*

Before Mr. Paradies was indicted in this case, Mr. Echols agreed to cooperate with the government by holding meetings with various City Council members, which were recorded on video and audio tape. App. 42a-43a. At these meetings, which were not attended by Mr. Paradies, Mr. Echols made a series of unsolicited statements directly implicating Mr. Paradies in the payments. For example, during a breakfast meeting with City Council President Marvin Arrington, Mr. Echols said that Mr. Paradies had "gone underground" and that Mr. Paradies's lawyer

would not allow him to appear before the grand jury or speak to anyone else involved in the government's investigation. App. 42a. Mr. Echols also twice claimed that Mr. Paradies was behind Mr. Echols's agreement to pay Mr. Arrington $5,000 to secure the appointment of a certain individual to chair the City Council's Transportation Committee. Gov't Ex. 480T at 18.

Mr. Paradies, the Paradies Companies, and Mr. Jackson were each charged with 83 counts of mail fraud in violation of 18 U.S.C. §§ 1341, 1346, and 2. Each count was based on the mailing of a management fee or dividend check to the minority-owned shareholder of Paradies Midfield in which Mr. Jackson had a beneficial interest. The government's theory at trial was that Mr. Paradies and the Paradies Companies had aided and abetted Mr. Jackson in a scheme to defraud the citizens of Atlanta of Mr. Jackson's honest services. Mr. Paradies was also charged with one count of conspiracy to bribe, in violation of 18 U.S.C. § 666, in connection with his alleged activities with Mr. Echols.

At trial, Mr. Echols was the government's key witness on the § 666 count. The defendants' cross-examination established that Mr. Echols had lied on numerous occasions, including in his testimony before the grand jury. App. 42a; R40-2085-2208. In rebuttal, the government offered some of Mr. Echols's tape-recorded conversations into evidence. The defendants objected, arguing, among other things, that the tapes were inadmissible because Mr. Echols arranged the conversations only after he began cooperating with the government. App. 42a-43a. The trial court admitted the tape-recorded conversations into evidence under Federal Rule of Evidence 801(d)(1)(B), which allows the jury to consider a witness's prior consistent statements both as substantive evidence and to rebut a charge of recent fabrication. App. 43a. The court did not give a limiting instruction, nor did the theory of admission allow one.

The jury convicted Mr. Paradies and the Paradies Companies on all counts. Post-trial motions for acquittal were denied.

On appeal, petitioners argued that 18 U.S.C. § 1346, the "honest services" amendment to the mail fraud statute, was impermissibly vague and, in all events, could not properly be applied to their alleged conduct. The court of appeals acknowledged that a panel of the Fifth Circuit had refused, in *United States v. Brumley*, 79 F.3d 1430 (5th Cir.), *reh'g en banc granted*, 91 F.3d 676 (5th Cir. 1996), to construe § 1346 to reach schemes to deprive the public of the "honest services" of state and local officials. But the court expressly "reject[ed] the defendants' reliance on *Brumley*" and "agree[d] with Judge Wood's dissent in *Brumley*." App. 28a & n.31. The court reasoned that "Congress' purpose in enacting § 1346 was to restore the mail fraud statute to its pre-McNally position" and thus to revive earlier case law that had allowed the mail fraud statute to reach dishonesty by state and local officials, whether or not it is criminal under state or local law. App. 28a.

Mr. Paradies also argued that the district court had erred in admitting the Echols tapes because the tapes were made after Mr. Echols began to cooperate with the government and had a motive to lie in the hope of obtaining a reduced sentence. Mr. Paradies based his argument on *Tome v. United States*, 115 S. Ct. 696, which was decided after the trial in this case. The Eleventh Circuit agreed that *Tome* barred the admission of the statements for their truth under Rule 801(d)(1)(B). The court nonetheless affirmed the admission of the tapes on a narrower ground that was never adopted by the district court and thus never explained to the jury: the tapes were admissible to "rehabilitate Echols' testimony" after his credibility had been impeached on cross-examination. App. 42a-43a. The court ignored the absence of a limiting instruction that would have confined the jury's consideration of the tapes to their rehabilitative value. Nor did the court address whether the admission of the tapes at trial for their truth had been prejudicial to Mr. Paradies.

The panel also rejected petitioners' other challenges to their convictions. A timely petition for rehearing with suggestion for rehearing en banc was denied. The court of appeals stayed the issuance of its mandate pending the filing of this petition.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS' DECISION THAT 18 U.S.C. § 1346 REACHES SCHEMES TO DEPRIVE THE PUBLIC OF HONEST STATE AND LOCAL GOVERNMENT IS INCONSISTENT WITH *McNALLY v. UNITED STATES* AND OTHER APPLICABLE DECISIONS OF THIS COURT.

As the government itself has recently acknowledged, petitioners' first question — whether 18 U.S.C. § 1346 may properly be construed to reach dishonesty by state and local officials in the conduct of their duties — is one of "exceptional importance."[1] This Court held a decade ago that, before the federal mail and wire fraud statutes could be used to set and enforce "standards of disclosure and good government for local and state officials," Congress would have to "speak more clearly than it has." *McNally v. United States*, 483 U.S. 350, 360 (1987). That was only the most recent application of the Court's well-established "clear statement" rule that requires Congress to speak with unmistakable clarity when it seeks to alter the delicate federal-state balance in an area of traditional state government authority. *See, e.g., United States v. Bass*, 404 U.S. 336 (1971).

We submit that Congress did not "speak more clearly" — or, indeed, at all — to that issue in § 1346, the one-sentence amendment to the mail fraud statute that it adopted in the wake of *McNally*. Yet, federal prosecutors are now routinely invoking § 1346 against state and local officials and their alleged confederates, charging them with all manner of "dishonesty" in the performance of official duties, whether or not such conduct is a crime under state law.[2] A panel of the Fifth Circuit, in *United*

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[1] Suggestion for Rehearing *En Banc*, *United States v. Brumley*, 79 F.3d 1430 (6th Cir. 1996) (No. 94-40560).

[2] In this case, the jury was instructed that the defendants could be convicted even though they did not violate any express duty or obligation under local or state law. R48-4256.

States v. Brumley, 79 F.3d 1430 (5th Cir.), *reh'g en banc granted*, 91 F.3d 676 (5th Cir. 1996), has held, in direct conflict with the Eleventh Circuit here, that § 1346 does not satisfy *McNally*'s requirement that Congress state clearly and expressly its intent to enforce standards of honest state and local government. This Court's guidance is needed to clarify whether, consistent with a long line of its cases including *McNally* itself, Congress must speak with greater clarity before the federal criminal law may so dramatically intrude into what has historically been the domain of state and local law.

* * * *

In *McNally*, this Court confronted the question whether the federal mail fraud statute — which contained no reference to state or local government, much less to "the intangible right of the citizenry to good government" — could be construed to reach conduct alleged to deprive citizens of such an intangible right. This Court held that the statute could not be construed to reach conduct by state and local government officials and others who infringed on such purely political interests, explaining that the statute did not clearly demonstrate that Congress intended to alter the federal-state balance in areas traditionally regulated by the states. In this case, the United States based its prosecution of petitioners on precisely the same theory that this Court rejected in *McNally*, and under a statute that still contains no indication that Congress intended to intrude into the realm of state and local political affairs. Under *McNally*, § 1346 cannot be stretched this far.

The petitioners in *McNally* — one an official of the State of Kentucky and the other a private citizen — had been charged with using the mails to obtain secret commissions on the State's insurance purchases. The court of appeals affirmed the petitioners' convictions on the theory, which was then the law in every circuit, that the mail fraud statute made it a federal crime "to defraud citizens of their intangible rights to honest and impartial government." 483 U.S. at 355.

In this Court, the petitioners argued that the mail fraud statute, 18 U.S.C. § 1341, could not properly be applied to their conduct for three reasons: *first*, the rule of lenity required that § 1341 be construed to apply only to schemes involving property, not "intangible rights"; *second*, federal prosecutors' use of § 1341 to reach "matters of strictly local concern" — including matters that were not even established to be criminal under state law — was too "extraordinary" to be justified "without a completely unambiguous congressional statement of intent"; and, *third*, § 1341 was unconstitutionally vague. *See* Brief for Petitioner at 14-15, 25-29, 34-36, *McNally v. United States*, 483 U.S. 350 (No. 86-286).

This Court reversed the petitioners' convictions in a decision that reflected all three of these concerns. After citing several of its prior decisions, the Court summarized its views as follows:

> Rather than construe the statute in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards of disclosure and good government for local and state officials, we read § 1341 as limited in scope to the protection of property rights. If Congress desires to go further, it must speak more clearly than it has.

483 U.S. at 360. The Court acknowledged that Congress may have the power to criminalize even those acts of state and local government officials that do not violate any state or local statute. *Id.* at 361 n.9. However, "if state law expressly permitted or did not forbid [the officials' conduct]," said the Court, "it would take a much clearer indication than the mail fraud statute evidences to convince us that [such conduct] defrauds the State and is forbidden under federal law." *Id.*

In reaching this conclusion in *McNally*, this Court was plowing familiar ground. This Court has long required that Congress speak with particular clarity if it intends to criminalize the sort of conduct that historically has been prosecuted by the states. *See United States v. Bass*, 404 U.S. 336 (cited in *McNally*, 483 U.S. at 360); *see also Williams v. United States*, 458 U.S. 279, 287,

290 (1982); *United States v. Enmons*, 410 U.S. 396, 411-12 (1973).

In *Bass*, the Court explained that Congress, in deference to "concepts of American federalism," has "traditionally been reluctant to define as a federal crime conduct readily denounced as criminal by the States." 404 U.S. at 349. Accordingly, a federal criminal statute will not be construed to have "significantly changed the federal-state balance" unless "Congress conveys its purpose clearly." *Id.* This "requirement of clear statement assures that [Congress] has in fact faced, and intended to bring into issue," whether to "effect a significant change in the sensitive relation between federal and state criminal jurisdiction." *Id.*; *see Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991) ("This plain statement rule is nothing more than an acknowledgement that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere.").

This Court has applied this "clear statement" rule on a number of occasions to circumscribe the reach of federal criminal statutes and thus to protect the sovereign powers of the states from unwarranted and unintended intrusion. In *Bass*, for example, the Court construed 18 U.S.C. § 1202(a) to reach felons' possession only of firearms with a nexus to interstate commerce, and not, as the government contended, possession of all firearms. The Court recognized that the government's broader construction of the statute was not implausible. *See* 404 U.S. at 340. But the Court held that a narrower construction was mandated by two independent principles: the rule of lenity that requires any ambiguity in a criminal statute to be resolved in the defendant's favor and, equally important the rule that Congress will not be assumed to have intended to intrude in an area of traditional state criminal jurisdiction unless such an intent is clearly expressed. *Id.* at 349-50. Because Congress had not stated plainly that it intended to reach all instances of firearm possession, whether or not connected with interstate commerce, the Court refused to construe the statute in a manner that would "dramatically

intrude[ ] upon traditional state criminal jurisdiction." *Id.* at 350.[3]

The Court applied the federalism principles articulated in *Bass* two years later in *Enmons*, which refused to construe the Hobbs Act to proscribe violent labor protests. The Court held that it would require "much more explicit" statutory language before it would conclude that "Congress intended to put the Federal Government in the business of policing the orderly conduct of strikes," and thereby effect "an unprecedented incursion into the criminal jurisdiction of the states." 440 U.S. at 396.

The Court subsequently invoked both *Enmons* and *Bass* in declining to construe 18 U.S.C. § 1014 to reach the passing of a bad check, although the Court recognized that the government's contrary construction of the statute was at least "plausible." *Williams*, 458 U.S. at 290. The Court explained that Congress must speak more clearly and unequivocally to "render a wide

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[3] A plurality of the Court had applied similar reasoning in *United States v. Five Gambling Devices*, 346 U.S. 441 (1953) (Jackson, J.), to construe a federal statute criminalizing the shipment of gambling machines to require a nexus with interstate commerce. The plurality did "not question that literal language of this Act is capable of the broad, unlimited construction urged by the Government," and, "[i]ndeed, if it were enacted for a unitary system of government, no other construction would be appropriate." *Id.* at 449-50. The plurality nonetheless rejected such a construction because it found "in the text no unmistakable intention of Congress to raise the constitutional questions implicit in the Government's effort to apply the Act in its most extreme impact upon affairs considered normally reserved to the states." *Id.* at 450. "[W]e should be sure that Congress has intentionally put its power in issue by the legislation in question," wrote Justice Jackson, "before we undertake a pronouncement which may have far-reaching consequences upon the powers of the Congress or the powers reserved to the several states." *id.* at 449. The plurality decision in *Five Gambling Devices* was invoked with approval in *Bass*, 404 U.S. at 349 n.16.

range of conduct violative of federal law" that, as here, "traditionally has been regulated by state law." *Id.*

Accordingly, when the Court in *McNally* directed Congress to speak "speak more clearly" if it intended to broadly criminalize dishonesty by state and local officials, the Court was applying a rule that was already well established to safeguard "American federalism." *McNally*, 483 U.S. at 360; *Bass*, 404 U.S. 349.[4] Congress did not respond to *McNally*, however, with any clear statement of such intent.

Shortly after *McNally* was decided, efforts began in Congress to overturn it. Both chambers considered bills that contained provisions that would have expressly recognized a right to honest state and local government, thereby punishing state and local political offenses. The Senate went so far as to adopt a bill that prohibited defrauding "the inhabitants of a State or political subdivision of a State" of "the honest services of an official or employee of such State or subdivision." *See* S. 2793, § 2, 134 Cong. Rec. S16317 (daily ed. Oct. 14, 1988).[5] The House,

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[4] The Court has continued since *McNally* to express these concerns in related contexts. *See, e.g., United States v. Lopez*, 115 S. Ct. 1624, 1631 n.3 (1995) ("When Congress criminalizes conduct already denounced as criminal by the States, it effects a change in the sensitive relation between federal and state criminal jurisdiction.") (quotation omitted); *accord Engle v. Issac*, 456 U.S. 107, 128 (1982).

[5] The Department of Justice submitted this proposal to Congress, explaining: "Since *McNally* was predicated upon the concern that the expansive use of the mail fraud statute resulted in the exercise of federal jurisdiction over conduct not clearly authorized by Congress, our approach of more clearly describing the conduct to be prohibited — i.e., a scheme or artifice corruptly to defraud or to deprive the inhabitants of the United States of the honest services of a public official — would remedy this problem." *Mail Fraud, Hearing Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 100th Cong., 2d Sess. 21 (1988) (testimony of John C. Keeney, Acting Assistant Att'y Gen.) [hereinafter "DOJ testimony"].

however, expressly struck that provision, and instead defined mail and wire fraud simply to include schemes to deprive "another" of the "intangible right of honest services." *See* 134 Cong. Rec. H11207 (daily ed. Oct, 21, 1988). This revised version (along with 30 unrelated provisions) was inserted into an omnibus drug bill that was adopted by both chambers on the last day of the 100th Congress. See Pub. L. 100-690, tit. VII, § 7603(a), 102 Stat. 4508 (1988). It is this provision that was codified as 18 U.S.C. § 1346.[6]

Section 1346 thus is utterly devoid of a "clear statement" of congressional purpose — as required by this Court in *Bass*, *Enmons*, *Williams*, and ultimately *McNally* — to "intrude[ ] upon traditional state criminal jurisdiction." *Bass*, 404 U.S. at 350. Nothing in the statute makes *any* reference to state or local government or to state or local officials. Much less is there any indication that Congress intended to reach conduct of state and local officials that is not criminal under state law. A court cannot conclude with any certainty from the text of the statute, or from its scant legislative history,[7] that Congress "has in fact faced, and

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[6] As the Fifth Circuit thus observed:

> The text of what is now § 1346 was never included in any bill filed in either the House of Representatives or the Senate and as a result the text of § 1346 was never referred to any committee of either the House or the Senate, was never the subject of any committee report from either the House or the Senate and was never the subject of any floor debate reported in the Congressional Record.

Brumley, 79 F.3d at 1436.

[7] Only two scraps of legislative history could conceivably be read to favor the government's position. First, Representative Conyers (who voted against the final bill that included § 1346) stated his personal view that § 1346 "restores the mail fraud provision to where that provision was before the *McNally* decision." 134 Cong. Rec. H11251 (daily ed. Oct. 21, 1988). Second, Senator Biden, whose Senate Judiciary Committee never had § 1346 before it, issued a post-enactment report stating that § 1346 was intended to "reinstate all of the pre-*McNally* case

intended to bring into issue," the propriety of criminalizing all manner of dishonesty by state and local officials and their associates, thereby intruding into the sensitive relationship between citizens and agents of a sovereign state. *Bass*, 404 U.S. at 349.[8]

To be sure, § 1346 did clarify that the mail fraud statute is not limited to fraud involving property rights, but also reaches fraud involving "intangible rights." But that addresses only one of the ambiguities identified by the petitioners and addressed by the Court in *McNally*. Congress still has not affirmatively authorized the use of the mail fraud statute to regulate the integrity of state and local government. *See McNally*, 483 U.S. at 360.[9]

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law," "including the right of the public to the honest services of public officials." 134 Cong. Rec. S17376 (daily ed. Nov. 10, 1988); *see Brumley*, 79 F.3d at 1437 n.5. (commenting that "the phrase 'including the right of the public to the honest services of public officials' in [the Biden] report [is] pure wishful thinking," given the House's rejection of the express honest government provision that had been approved by the Senate).

[8] Congress has elsewhere had no difficulty in making clear its intent to reach certain varieties of corruption involving state and local government. For example, 18 U.S.C. § 666 prohibits "corruptly giv[ing], offer[ing] or agree[ing] to give anything of value to any person, with intent to influence or reward an agent of an organization or of a State, local or Indian tribal government, or any agency thereof, in connection with any business, transaction, or series of transactions of such organization, government, or any agency thereof."

[9] A construction of § 1346 that did not reach dishonesty by state and local officials would not render the statute meaningless. It is undisputed that the statute applies to *private sector* fraud involving "honest services." *See, e.g., United States v. Jain*, 93 F.3d 436, 441 (8th Cir. 1996), *pet. for cert. filed*, No. 96-1167, 65 U.S.L.W. 3531 (U.S. Jan. 17, 1997). The government frequently brings prosecutions on that theory. *The Federal Mail Fraud Statute After* McNally, 25 AM. CRIM. L. REV. 743, 748 & nn.24-26, 753 & nn.55-59 (1988).

It is particularly vital to "concepts of American federalism," *Bass*, 404 U.S. at 349, that the "clear statement" rule be applied in construing § 1346. *First*, under the contrary construction adopted by the government and the court below, § 1346 would intrude far more significantly into the domain of state and local government than did the statutes at issue in *Bass*, *Enmons*, and *Williams*. Whereas those statutes criminalized conduct of private individuals that traditionally had been regulated by the states, the government's construction of § 1346 would criminalize conduct of state and local officials themselves and those (such as petitioners here) with whom they do business. Section 1346 would necessarily involve federal prosecutors, federal judges, and federal juries in "setting standards of disclosure and good government for local and state officials." *McNally*, 483 U.S. at 360; *see* Geraldine Szott Moohr, *Mail Fraud and the Intangible Rights Doctrine: Someone to Watch over Us*, 31 HARV. J. ON LEGIS. 153, 157 (1994) (observing that "[t]he balance between national and local government is tilted toward the former when federal authorities acting under ambiguous legislative standards monitor local political conduct").

Second, § 1346 would reach a vast array of official conduct, the "outer boundaries" of which are vague, "ambiguous," and "ethereal." *McNally*, 483 U.S. at 360; *Carpenter v. United States*, 484 U.S. 19, 25 (1987). A "catch-all political crime" of such uncertain scope would pose a significant "potential for abuse, through selective prosecution," by "lodg[ing] unbridled power in federal prosecutors to prosecute political activists" at the state and local levels. *United States v. Margiotta*, 688 F.2d 108, 144 (2d Cir. 1982) (Winter, J., concurring in part, dissenting in part) (discussing pre-*McNally* "intangible rights" doctrine), *cert. denied*, 461 U.S. 913 (1983).[10]

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[10] A narrow construction of § 1346 would avoid the constitutional vagueness concerns raised by the government's expansive reading of § 1346. *Cf. Screws v. United States*, 325 U.S. 91, 103 (1945) (plurality opinion) (due process concerns may necessitate construing statute to require intent to violate "definite" and well-settled law). In fact, during

Third, Congress enacted § 1346 in the immediate aftermath of this Court's directive in *McNally* to "speak more clearly" if it intended that the federal government police the ethics of state and local government officials. 483 U.S. at 360. The Court separately stated that, in order to permit federal prosecutions based on conduct of state and local officials that was not criminal under state and local law, Congress would have to give "a much clearer indication." *Id.* at 361 n.9. But Congress failed to provide *any* such indication. Instead, when presented with the opportunity to enact a statute that expressly reached political conduct by state and local officials whether or not criminal under state law, Congress avoided doing so.

The Eleventh Circuit's application of § 1346 to the conduct at issue in this case presents the same issues of statutory construction and the same fundamental federalism concerns that this Court confronted in *McNally*. The Eleventh Circuit's decision ignores this Court's directive in *McNally* and conflicts with the Fifth Circuit's decision in *Brumley*. This Court should grant certiorari to reaffirm the principles of federalism and comity that lie at the heart of *McNally* and our system of government.

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congressional consideration of legislation to overrule *McNally*, a representative of the Department of Justice cautioned that merely redefining fraud to include "intangible rights" would leave "vagueness in the statute [that] may result in yet another 'adverse' Supreme Court decision." DOJ testimony, *supra*, at 18. He therefore explained that "the proper approach is to more clearly identify the offensive criminal conduct which should be prohibited." *Id.* at 19. But Congress rejected that option.

II. THE COURT OF APPEALS' AFFIRMANCE OF A CONVICTION OBTAINED WITH EVIDENCE THAT CONCEDEDLY WAS IMPROPERLY ADMITTED UNDER *TOME v. UNITED STATES* CONFLICTS WITH THE DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS.

The decision of the court of appeals rests on two interrelated evidentiary rulings that conflict with the decisions of both this Court and other courts of appeals. The first is that prior consistent statements made after the declarant had a motive to lie are admissible to "rehabilitate," even though, under *Tome v. United States*, 115 S. Ct. 696, they are not admissible for their truth. The second is that an appellate court may sustain a conviction that rests on prejudicial evidence that was erroneously admitted for its truth, without a limiting instruction, so long as the evidence could properly have been admitted for some narrower purpose.

* * * *

In this case, the district court, over petitioners' hearsay objection, admitted into evidence extraordinarily prejudicial tape-recorded conversations arranged by the government's star witness, Harold Echols. *See supra* pages 3-4.[11] Because these statements were consistent with Mr. Echols's trial testimony implicating Mr. Paradies in the payments made to City officials, the district court held them admissible under Federal Rule of Evidence 801(d)(1)(B) both for their truth and for rehabilitation of Mr. Echols. App. 44a.

On appeal, petitioners, the government, and the Eleventh Circuit all "agree[d] that the admission of the tapes under this rule was error, because the Supreme Court has recently decided [in *Tome*] that the prior consistent statement under the rule must

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[11] The district court disallowed the tapes in the government's case-in-chief because, *inter alia*, they were "unduly prejudicial" relative to their probative weight. App. 43a.

have been made *before* the alleged influence or motivation to fabricate arose." App. 43a. Yet, the court of appeals held that the admission of the tapes "was proper despite the [district] court's erroneous ruling" because the tapes were "relevant to rehabilitate Echols." *Id.* This conflicts with decisions of this Court and other courts of appeals.

A. This Court Should Resolve The Circuit Conflict Over Whether The Common Law Relevance Rule — That Prior Consistent Statements Made With A Motive To Lie Are Not Admissible To "Rehabilitate" — Survived The Enactment Of The Federal Rules Of Evidence.

1. The Decision Below Is Contrary To The Common Law As Well As To Decisions Of Several Circuits Under The Federal Rules Of Evidence.

The common law generally excluded from evidence a witness's prior consistent statements that were offered to bolster his or her credibility. *See* Edward D. Ohlbaum, *The Hobgoblin of the Federal Rules of Evidence: An Analysis of Rule 801(d)(1)(B), Prior Consistent Statements and a New Proposal*, 1987 B.Y.U. L. REV. 231, 235. Prior consistent statements were admissible to rebut an opponent's charge that the witness's testimony was recently fabricated due to a motive to lie. *Tome*, 115 S. Ct. at 700 (citing *Ellicott v. Pearl*, 35 U.S. (10 Pet.) 412, 439 (1836)). The common law excluded even these prior consistent statements, however, if they were made after the witness's motive to lie arose. *Id.* This "pre-motive requirement" derived from considerations of relevance: a witness's mere repetition of a statement, while he or she is under the same motive to lie, is not probative of his or her credibility. The prior consistent statement is probative only if it was made before the witness acquired a motive to lie. *See, e.g., id.* at 701; 4 John Henry Wigmore, *Evidence in Trials at Common Law* ¶ 1124 (James H. Chadbourn rev. 1972); *McCormick's Handbook of the Law of Evidence* § 49, at 105 (Edward E. Cleary ed. 1972).

The Federal Rules of Evidence incorporated, and expanded, the common law rule. *See Tome* 115 S. Ct. at 701. Rule 801(d)(1)(B) provides that prior consistent statements, when offered to rebut a charge of recent fabrication or improper motive, are not hearsay. Thus, such statements are admissible not only as rehabilitative evidence (as at common law), but also as substantive evidence. *Id.*

The courts of appeals soon began to disagree about which elements of the common law relevance rule survived the adoption of Rule 801(d)(1)(B). One conflict arose over whether the Rule incorporated the common law's pre-motive requirement with regard to the admissibility of prior consistent statements as substantive evidence. That conflict was resolved in *Tome*. The Court held that a prior consistent statement is nonhearsay under Rule 801(d)(1)(B) — and thus is admissible for its substance — only if the statement was made before the declarant had a motive to lie. *See* 115 S. Ct. at 700.

A second conflict arose over a related question: whether post-motive statements, even if not admissible for their substance, are admissible when offered solely for rehabilitation. *Compare United States v. Quinto*, 582 F.2d 224, 233 (2d Cir. 1978) (pre-motive requirement applies to statements offered solely to rehabilitate)[12] *and United States v. Miller*, 874 F.2d 1255, 1273 (9th Cir. 1989) (same; noting conflict with Seventh Circuit) *with Engebretsen v. Fairchild Aircraft Corp.*, 21 F.3d 721, 730 (6th Cir. 1994) (pre-motive requirement does not apply to statements offered solely to rehabilitate) *and United States v. Harris*, 761

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[12] The Second Circuit later relaxed *Quinto*'s strict pre-motive requirement, holding that a post-motive consistent statement may, in some circumstances, be relevant and admissible to rehabilitate a witness. *United States v. Pierre*, 781 F.2d 329, 333 (2d Cir. 1986). The ruling in *Quinto* continues to apply, however, when the credibility of the witness has only been subject to a "generalized attack." *United States v. Brennan*, 798 F.2d 581, 588 (2d Cir. 1986), *aff'd*, 867 F.2d 111 (2d Cir.), *cert. denied*, 490 U.S. 1022 (1989).

F.2d 394, 399 (7th Cir. 1985) (same) *and United States v. Bowman*, 798 F.2d 333, 338 (8th Cir. 1986) (same), *cert. denied*, 479 U.S. 1043 (1987).

This disagreement among the courts of appeals continues unabated after *Tome*. The Tenth Circuit recently held that a witness's prior consistent statements made after he or she had a motive to lie are not admissible even for rehabilitation. *United States v. Albers*, 93 F.3d 1469, 1484 n.2 (10th Cir. 1996). *Albers*, as well as the Second and Ninth Circuit decisions noted above, conflicts with the decision in this case. Here, the Eleventh Circuit affirmed the admission of post-motive statements for "rehabilitation," while recognizing that, under *Tome*, such statements are not admissible for their substance. App. 42a-43a.

2. The Decision Below Is Incompatible With *Tome*.

The decision below not only perpetuates this circuit conflict, but also is inconsistent with both the common law and the rationale of *Tome*. In *Tome*, the Court offered two principal reasons for concluding that the common law's pre-motive requirement survived the adoption of Rule 801(d)(1)(B). Both reasons undermine the holdings of those courts, including the Eleventh Circuit in this case, that have abandoned the pre-motive requirement for statements offered for rehabilitation.

First, the Court in *Tome* concluded that the drafters of the Federal Rules had assumed the continuing validity of the common law's prior consistent statement rule and had incorporated it into Rule 801(d)(1)(B). The Court noted that the common law would admit prior consistent statements to rebut charges of recent fabrication or improper influence or motive. *Tome*, 115 S. Ct. at 701. However, because prior consistent statements are less probative to rebut charges of mendacity, misconduct, or bad reputation, they were not admissible for that purpose under the common law. *Id.* The Court went on to observe that a witness's post-motive statements obviously cannot refute charges that the witness was improperly influenced by that very motive; hence, such prior consistent statements also were inadmissible under the common law. The Court reasoned that, because the drafters

explicitly incorporated one common-law limitation into Rule 801(d)(1)(B) (*i.e.*, the admissibility of prior consistent statements only after certain kinds of impeachment), the drafters must also have intended to incorporate the second (*i.e.*, the admissibility of prior consistent statements only if made before a motive to lie arose). *Id.* The Court found this conclusion to be corroborated by the Rule's "peculiar language," which mimics the common law. *Id.* at 702.

The Eleventh Circuit's holding is inconsistent with this rationale for two reasons. First, the Eleventh Circuit assumed, contrary to *Tome*, that the Federal Rules of Evidence abrogated the common law rule by mere implication. *See United States v. Texas*, 507 U.S. 529, 533 (1993) (rule of construction that Congress overturns the common law only expressly). Second, if the common law's relevance concerns survive to exclude post-motive statements offered for their substantive value, as *Tome* holds, those same relevance concerns *a fortiori* should exclude the same statements offered for rehabilitation. After all, the relevance concerns noted by the *Tome* Court — concerns that justified the common law's exclusion of prior consistent statements in many contexts — related to rehabilitative, not substantive, relevance. *See* 115 S. Ct. at 701-02.

Second, the Court grounded *Tome* on the practical concern that any alternative to a strict pre-motive requirement would be so amorphous and unpredictable as to impede trial preparation. The government, the *Tome* dissent, and the court below all endorsed such an alternative approach, reading Rule 801(d)(1)(B) to impose a flexible standard requiring case-by-case evaluation of the probative value of each post-motive statement. *See id.* at 702, 704 (describing government's argument); *id.* at 708 (Breyer, J., dissenting); *United States v. Tome*, 3 F.3d 342, 350 (10th Cir. 1993), *rev'd*, 115 S. Ct. 696 (1995). But this Court explained that a more flexible approach would give rise to "the precise dangers the Advisory Committee noted and sought to avoid" in drafting the Federal Rules: "It involves considerable judicial discretion; it reduces predictability; and it enhances the difficulties of trial preparation because parties will have difficulty knowing

in advance whether or not particular out-of-court statements will be admitted." 115 S. Ct. at 704-05. The admission of prior consistent statements for rehabilitation merits the same bright-line rule for the same reasons.

Finally, under the Eleventh Circuit's departure from the common law's treatment of post-motive prior consistent statements, this Court's decision in *Tome* could be readily circumvented. Often, although a litigant would be barred by *Tome* from introducing a witness's prior consistent statement for its truth, the litigant could introduce the same statement on the pretext that it was being offered for rehabilitation. Where, as here, the statement was particularly prejudicial or inflammatory, a jury might have significant difficulty considering the statement only for a limited purpose, even if, unlike here, it was instructed to do so.

* * *

The admissibility of post-motive prior consistent statements for rehabilitative purposes is an issue that arises with considerable frequency. Nearly every court of appeals has been confronted with the issue, usually in a criminal case, at least once in the past fifteen years. A common scenario is when the government secures the assistance of a professed accomplice of the defendant — an individual who typically has chosen to cooperate with the government in the expectation of leniency in sentencing. Such a witness will have a powerful motive to fabricate or embellish a story to the defendant's prejudice. Furthermore, that witness has usually given his story before, whether during an investigation, *e.g.*, *Quinto*, 582 F.2d at 226 (government investigator's memorandum of interview), or when making overtures to the government, *e.g.*, *Albers*, 93 F.3d at 1482 (accomplice's statement to investigator in interview), or (as in this case) on tape as the investigation proceeds.

Accordingly, when the defense challenges such a witness's motive, the door is open to the introduction of prior consistent statements — including, under the Eleventh Circuit's view, those made after the witness had a motive to lie. Apart from the

corroborative weight the jury may give a witness's prior consistent statements, such statements often carry what one scholar has called "overhang" — details, or images, or the authority of being in writing that make the prior statements far more prejudicial than in-court testimony. *See* Richard D. Friedman, *Prior Statements of a Witness*, 1995 SUP. CT. REV. 277, 307. The risk of exposing the jury to such statements may cause defense counsel to refrain from challenging the witness's credibility in the first place. The admissibility of such statements may, therefore, be critical to the outcome of a significant number of cases.

So important and pervasive an issue — one on which the circuits are sharply divided, with some embracing rules inconsistent with the common law and the rationale of *Tome* — warrants this Court's consideration.

B. The Court Should Resolve The Conflict Among The Courts Of Appeals Over When An Appellate Court May Affirm The Admission Of Evidence On A Ground Narrower Than That Invoked At Trial.

The Eleventh Circuit's ruling presents an additional conflict with decisions of both this Court and other circuits on an important question that arises frequently in appeals of evidentiary rulings: If a trial court erroneously admits evidence for its truth, without any limiting instruction, may the court of appeals automatically affirm on the ground that the evidence could have been admitted for a narrower purpose? Or must the appellate court engage in at least some analysis of whether the admission of the evidence without a limiting instruction was prejudicial? The Eleventh Circuit embraced the former approach in this case.

* * * *

It is well settled that the erroneous admission of evidence may be affirmed if the evidence could have been introduced at trial for the same purpose on another theory. In that instance, the trial court's only error is in giving the wrong reason for its ruling, which is harmless. *See, e.g.*, *Tome*, 115 S. Ct. at 705 (holding

that lower court should consider, on remand, whether statements were admissible for their truth on ground other than Rule 801(d)(1)(B)). However, when the alternative theory offered on appeal would have allowed the evidence to be admitted only for a more limited purpose, a more searching inquiry is required by *Shepard v. United States*, 290 U.S. 96 (1933).

In *Shepard*, the petitioner was convicted of murdering his wife based in part on her out-of-court statement that "Dr. Shepard has poisoned me." The trial judge admitted the statement for its substance as a dying declaration. 290 U.S. at 98. On appeal, both the Tenth Circuit and this Court held that the trial court erred because the wife, who lived for another month after the statement, had not "spoken with the consciousness of a swift and certain doom." *Id.* at 100. But the court of appeals nonetheless affirmed the conviction because the statement was relevant apart from its truth: its utterance suggested that Mrs. Shepard wanted to live, and therefore rebutted a defense claim that she had committed suicide. *Id.* at 102.

This Court, in an opinion by Justice Cardozo, unanimously reversed. The Court emphasized that the trial judge had admitted the statement for its truth, not for the "narrow purpose now suggested as legitimate." 290 U.S. at 102-03. The defendant thus could not, and did not, request a limiting instruction, and the jury considered the statement "for the broader purpose, as the court intended that they should." *Id.* at 103. The Court concluded that it would be unfair to sustain the conviction based on some narrower theory of admissibility, especially given the importance of the wife's statement to the case.

A number of appellate decisions have followed *Shepard* in evaluating the erroneous admission of prior consistent statements. The Second Circuit, for example, has rejected precisely the argument accepted by the Eleventh Circuit here: namely, that the trial court's error in admitting a prior consistent statement for its truth is harmless whenever the evidence is admissible for "more limited, and allegedly, permissible, purposes." *United States v. Check*, 582 F.2d 668, 681-83 (2d Cir. 1978). Invoking *Shepard*,

the court of appeals explained that "it would be unfair to consider the admissibility of the evidence for any narrower purpose than that upon which the testimony was unquestionably offered and received at trial." *Id.* at 683. In *Tome* itself, the Tenth Circuit refused to consider whether the witness's prior consistent statements, which the district court admitted for their truth under Rule 801(d)(1)(B), were at least admissible "to rehabilitate." The court of appeals explained that "the government offered the statements [at trial] for their full substantive effect." 3 F.3d at 350 & n.6.[13]

The Eleventh Circuit's decision in this case is inconsistent with *Shepard* and its progeny. Here, on the government's motion, the district court admitted the Echols tapes for their truth under Rule 801(d)(1)(B). Petitioners could not, and thus did not, request a limiting instruction. The jury, in turn, did not know that it could consider Mr. Echols's statements not for their truth, but only for some more limited purpose. It was as "unfair" to petitioners here as it would have been to the defendants in *Shepard* and *Check* for the appellate court — without any analysis of the statements' prejudicial impact — "to consider the admissibility of the evidence for any narrower purpose than that upon which the testimony was unquestionably offered and received at trial." *Check*, 582 F.2d at 683; *accord Shepard*, 290 U.S. at 103.[14]

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[13] This aspect of the Tenth Circuit's ruling was not disturbed by this Court's subsequent decision in *Tome*.

[14] The court of appeals' failure to address whether petitioners were prejudiced by the absence of limiting jury instructions at trial also conflicts with *United States v. Johnson*, 54 F.3d 1150, 1156-57, 1160 (4th Cir.), *cert. denied*, 116 S. Ct. 266 (1995); *United States v. Castillo*, 14 F.3d 802, 806 (2d Cir.), *cert. denied*, 115 S. Ct. 101 (1994); *United States v. Lopez*, 979 F.2d 1024, 1033-35 (5th Cir. 1992), *cert. denied*, 508 U.S. 913 (1993); and *Campbell v. Coleman Co.*, 786 F.2d 892, 896-97 (8th Cir. 1986). Its failure to address whether the jury actually considered the evidence for its truth conflicts with *United States v. Magnus*, 743 F.2d 517, 522-23 (7th Cir. 1994); *Martinez v. McCaughtry*, 951 F.2d 130, 133 & n.4 (7th Cir. 1991); and *United*

The Eleventh Circuit is not alone in deviating from *Shepard*'s mandates. For example, in *United States v. Harris*, 761 F.2d at 400, the Seventh Circuit held that even where the trial court had erroneously admitted prior consistent statements for their truth under Rule 801(d)(1)(B), the conviction need not be reversed if the statements were admissible for the more limited purpose of rehabilitation. Similarly, in *United States v. Powers*, 59 F.3d 1460, 1466 (4th Cir. 1995), *cert. denied*, 116 S. Ct. 784 (1996), the Fourth Circuit held that, although the trial court had erred in admitting prior act evidence to show the defendant's bad character, the conviction need not be reversed because the evidence was relevant to the victim's credibility. In dissent, Judge Lay condemned as "a clear denial of due process" the panel majority's "post hoc rationalization"; he chided the majority for "ignor[ing] the theory on which the case was presented to the jury and fictionaliz[ing] that, notwithstanding the erroneous instructions as to the relevancy of the evidence, the jurors somehow, some way, would know that there was another legal theory under which obviously prejudicial evidence should be considered." *Id.* at 1475-76.[15]

It is important that the Court resolve the conflict among the circuits on whether, or in what circumstances, a trial court's erroneous admission of evidence for its truth (or some other broad purpose) may be excused because the trial court could have admitted the evidence for some narrower purpose. This confusion

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States v. Mahler, 579 F.2d 730, 736 & n. 21 (2d Cir.), *cert. denied*, 439 U.S. 991 (1978).

[15] *See also, e.g., United States v. Gocke*, 507 F.2d 820, 824 n.4 (8th Cir. 1974) (observing that the court has upheld the erroneous admission of other crimes evidence "if an alternative theory would have justified the jury's consideration thereof"), *cert. denied*, 420 U.S. 979 (1975); *United States v. Cintolo*, 818 F.2d 980, 998 n.8 (1st Cir. 1987) (holding that evidence erroneously admitted for its truth as co-conspirator statement "was properly admissible into evidence on another theory as a 'verbal act' not offered for the truth of the matter asserted under Fed.R.Evid. 801(c)"), *cert. denied*, 484 U.S. 913 (1987).

is unlikely to be resolved without the Court's intervention. The circuits' numerous rulings on the question have been largely *ad hoc*, with only rare reference to *Shepard* or other appellate decisions. Only a clear statement by the Court on this important issue can bring about a fair and uniform approach.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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February 21, 1997

APPENDIX

UNITED STATES COURT OF APPEALS, ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
DANIEL M. PARADIES, THE PARADIES SHOPS, INC., PARADIES MIDFIELD CORPORATION, IRA JACKSON, Defendants-Appellants.
No. 94-8485.

Sept. 23, 1996.

Appeals from the United States District Court for the Northern District of Georgia.

Before TJOFLAT, Chief Judge, COX, Circuit Judge, and WELLFORD*, Senior Circuit Judge.

WELLFORD, Senior Circuit Judge:

Defendants Ira Jackson,[1] Daniel Paradies, The Paradies Shops, Inc., and Paradies Midfield Corp.,[2] were convicted pursuant to

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* Honorable Harry W. Wellford, Senior U.S. Circuit Judge for the Sixth Circuit Court of Appeals, sitting by designation.

[1] Ira Jackson was the first black person elected to the Atlanta City Council and served from 1970 to 1990. In the 1960's, Jackson opened several retail stores, including grocery stores, auto parts stores, and tire dealerships, but went bankrupt in 1978 and 1979. As councilman, he developed close ties with the Atlanta political power structure, especially with airport operations and with the law firm utilized by the mayor.

[2] Daniel Paradies, the individual, will be referred to herein as "D. Paradies." The Paradies Shops will be referred to as "Shops," and Paradies Midfield will be referred to as "Midfield." D. Paradies, Shops, and Midfield, collectively, will generally be referred to as "the Paradies defendants." The Paradies companies and D. Paradies filed separate briefs, and each have adopted the others' arguments by

a 133 count indictment charging them with various offenses arising out of the operation of the concessions at the Atlanta Hartsfield International Airport. The bulk of the charges involved mail fraud (18 U.S.C. §§ 1341, 1346, and 2), conspiring to make corrupt payments to public officials (18 U.S.C. §§ 371, 666), and tax fraud (26 U.S.C. § 7206). The defendants challenge their convictions and their sentences, which were imposed after a lengthy jury trial, on several grounds.

Two fraudulent schemes were involved in the indictment. In the first, the government alleged that Jackson and D. Paradies, the largest subconcessionaire at the Atlanta airport, conspired to profit from Jackson's influence as an Atlanta City Council member and as the Commissioner of Aviation. According to the government's theory, Jackson used his political position to reduce the rent of the concessionaires, including the Paradies defendants, by very substantial amounts. In return Jackson, who allegedly owned an interest in the Paradies businesses, reaped benefits through payments from D. Paradies, which purported to be fees and dividends. In the second alleged scheme, which was much less complicated, D. Paradies and another subconcessionaire, Harold Echols, regularly gave cash to Jackson and other City Council members for favorable votes in matters before the Council in which the Paradies defendants (and other concession operators) had an interest.

The particular circumstances surrounding the fraudulent schemes were fervently disputed at trial. The facts set out below are those which the jury might reasonably have found from the evidence properly admitted at trial.

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reference. Therefore, unless specifically stated otherwise, we deem the arguments raised by one to be made by and to inure to the benefit of the others.

I. STATEMENT OF THE CASE

A. The Airport Concessions Program

The City of Atlanta owns and controls the Atlanta airport. From its opening in 1980, Dobbs Paschal Midfield Corp. ("Dobbs") was the principal concessionaire, managing all the airport concessions under contract with the City. Dobbs contracted with various subconcessionaires, including the Paradies defendants, to provide food, merchandise, and services. The subconcessionaires paid rent to Dobbs based on the greater of a percentage of sales or a guaranteed minimum. In turn, Dobbs agreed to pay the city a percentage of sales or a guaranteed minimum of $240 million over the first 15 years of operation. Dobbs' agreement with the City required that at least twenty percent of the total dollar volume of the concessions program be produced or controlled by minority controlled enterprises. That contractual provision provided the defendants an incentive to work out their schemes.[3]

D. Paradies was president and principal shareholder of Shops, a major gift shop chain at airports across the country. D. Paradies was also president of Midfield, a company which contracted to operate exclusively the gift shops in the airport in 1979. Shops owned sixty-five percent of Midfield's stock, and the other thirty-five percent was owned by minority controlled businesses in accordance with the minority participation requirement.[4] That thirty-five percent was comprised of three

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[3] Wilbourn, a McDonalds franchisee, was greatly enriched by these and other private affirmative action and set-aside programs in becoming involved as an MBE participant in several Atlanta operations and with D. Paradies in airport operations across the country. Although intended to benefit a segment of Atlanta's population the set-aside, unfortunately, resulted in pollution of the political process insofar as the lucrative airport concession business was concerned.

[4] Dobbs required a thirty-five percent minority interest in Midfield for reasons unexplained.

corporations that were wholly owned by black persons, Mack Wilbourn,[5] Nathaniel Goldston, and Joanne McClinton. Wilbourn's business, Kinley Enterprises, Inc. ("Kinley"), held 18.3% of Midfield stock; Goldston's business, Airport Enterprises, Inc. ("AEI"), held 13.7%; and McClinton's business, Estate Management ("Estate"), held 3%. As was provided for in the shareholder agreements, the minority members supposedly received a management fee of 1.1% of Midfield's gross receipts. Midfield also paid Shops a management fee of 9% by mailing checks on a monthly basis.

B. Jackson's Loan/Purchase from Goldston and Wilbourn

By the spring of 1985, D. Paradies' relationship with the first minority shareholders group soured. At that point, the government contends, D. Paradies sought to include defendant Jackson as a minority participant in Midfield. D. Paradies and Jackson were close personal friends. In 1980, Paradies and Echols hosted the wedding reception for Jackson and his bride, Maudestine "Mimi" Simmons.[6]

In April of 1985, Paradies wrote a "personal and confidential" letter to Jackson requesting Jackson's assistance in obtaining space for additional shops in the airport. If the space was obtained by October 1, 1985, Paradies stated, the minority shareholders would receive an increase in management fees to 2%. If the space were not obtained, the fee would remain at 1.1% for those shareholders. Under the government's theory, D. Paradies' letter was an invitation to Jackson to capitalize on a near doubling of the minority participants' management fee increase. Soon

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[5] Wilbourn was a defendant in this case, but was acquitted at trial. His role in the fraud will be set out below.

[6] Additionally, Mimi and D. Paradies' wife, Billie Paradies, were close friends. One of the alleged fraudulent "loans" was put in Mimi's maiden name. When the fraud was uncovered, D. Paradies claimed that he did not know that Maudestine Simmons and Mimi Jackson were one and the same person.

thereafter, Jackson began to negotiate with Goldston to purchase his interest in Midfield.

Goldston told Jackson that he was experiencing financial difficulty, and purportedly offered to sell Jackson his stock in Midfield for $50,000. Jackson made a "loan" to Goldston for $50,000 through his wife Mimi, operating as Metro Consultants, Inc.[7] The government maintained that the purported loan was, in fact, a purchase by Jackson of Goldston's interest. Indeed, Jackson's check to Goldston on his personal checking account specified: "For Metro Consultants—Purchase Stock." The government also introduced agreements which purportedly transferred Goldston's Midfield stock in the name of AEI to Metro Consultants. On October 1, 1985, moreover, Midfield terminated its management agreement with Goldston and entered into a new comparable agreement with Jackson's wife. Mrs. Jackson was to render administrative assistance in return for her portion of the 1.1% management fee. Also, in order to qualify as a minority business, Metro Consultants had to be certified as a minority-owned company. Jackson asked the Atlanta Office of Contract Compliance to expedite the certification for Metro Consultants because his wife wanted to "buy out" Goldston and Wilbourn.

After Jackson had already distributed the "loan proceeds," he appeared before the City's Board of Ethics for an opinion on the propriety of his "loan." Jackson told the Board that he had loaned $50,000 to Goldston, and that his wife wished to purchase Goldston's and Wilbourn's interests in Midfield. He also stated that Wilbourn's "asking price" was $275,000. Jackson also testified that he had discussed the matter with D. Paradies. Jackson assured the Board that if the transaction were approved, he would not vote on any airport concessions matters, and that he wanted to be "up front" with the Board. Noting, among other things, that subconcessionaires issues came before the Council

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[7] All the participants in the schemes formed separate corporate entities to engage in airport operations.

frequently, and that Jackson's interest could have at least an indirect influence on Council decisions, the Ethics Board disapproved of the proposed purchase. Such an acquisition by Jackson and his wife, the Board concluded unanimously, would violate the Code of Ethics and would result in a breach of Jackson's fiduciary duty to the City.[8] According to the Ethics director, Jackson told him that he disagreed with the Board's decision, but that he would "not undertake to do indirectly what [the] board had told him could not be done directly."

After the Ethics Board's decision, Jackson entered into another disputed transaction with Wilbourn, who, according to Jackson, was experiencing financial difficulty.[9] Purportedly, Jackson "loaned" Wilbourn $275,000 (the exact asking price identified by Jackson in his Ethics Board testimony) from Options International, Inc. ("Options"), a corporation created in the name

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[8] The "Disclosure of Interest" section of the Atlanta Code of Ethics provides in part:

> [A]ny council member . . . who has a private interest, direct or indirect, in any proposed legislation or any decision pending before such person or the body of which the person is a member or employee, shall not vote for or against, discuss, decide or in any way participate in considering the matter, but shall publicly disclose, on the official records of the body, the nature and extent of such interest, prior to any determination of the matter.

Section 18-2008 of the Atlanta City Code, entitled "Investments in Conflict with Official Duties," provides in part:

> [No] . . . council member . . . shall invest, or hold any investment directly or indirectly, in any financial, business, commercial or other private transaction which creates a conflict with or adversely affects his official duties to the detriment of the city.

[9] The Paradies Companies maintain that Wilbourn needed the money to finance another minority enterprise opportunity in the Atlanta underground.

of his son, Ira Jackson, Jr., but controlled by Jackson himself.[10] The transaction was to be effected in two installments: $150,000 immediately, and $125,000 payable on May 1, 1987. Wilbourn used $50,000 of the proceeds to buy Goldston's stock, and transferred all of his and Goldston's interest in Midfield to Hartsfield Concessions, Inc. ("Hartsfield"), a company purportedly wholly owned by Wilbourn. The loan from Options was secured by all the revenue from Wilbourn's interest in Midfield. The stock in Midfield, Jackson claims, was never transferred to him as security for the loan. [11]

The government argued that this was a sham loan agreement so that Wilbourn, doing business as Hartsfield, would be the minority participant in Midfield "on paper" only, and that Jackson was the *de facto* owner, reaping the full benefits of Wilbourn's interest in Midfield. There is evidence, together with reasonable inferences, that supports the government's contention. Jackson admits in his brief that, upon Wilbourn's counsel's recommendation, Jackson was given some control over the funds of Hartsfield, and that Jackson was authorized to accept payments directly from Midfield. Indeed, evidence showed that Jackson initially went to the Paradies company offices to pick up the dividend and management checks, which were made payable to Hartsfield, *then later these checks to Hartsfield were mailed to Jackson directly*. The evidence also showed that the first twenty-three Hartsfield management fee checks were personally endorsed by Jackson and ultimately deposited into his own personal bank account.

Between December, 1985, and March of 1992, D. Paradies paid Jackson, through Hartsfield, fees and dividends, more than $1,049,000, nearly four times the amount of the original

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[10] The evidence was overwhelming that Options was a Jackson alter ego.

[11] D. Paradies states in his brief, however, that Hartsfield pledged to Option its stock in Midfield, as well as the fees and dividends. D. Paradies concludes in his brief that "Mr. Jackson thus came to have a financial interest in Mr. Paradies' corporation."

$275,000 "loan." After the minority interests were transferred to Hartsfield, Wilbourn never received another payment from the Paradies Companies, and he had no further substantial contact with Midfield. The government showed that Jackson had complete control over the Hartsfield bank account (making deposits, writing and signing checks, and making tax returns), despite Jackson's claims that he never had "control of Hartsfield Concessions, Inc. or use[d] funds from the corporation for personal loans or payments." (Jackson's Brief at p. 10.) The proof indicated, however, that after checks were deposited into the Hartsfield account, Jackson would immediately transfer the money to his own corporation, Options, which transacted no business except the receipt of funds from Hartsfield. Through this "dummy" corporation, Jackson spent hundreds of thousands on such items as a $350,000 condominium on Peachtree Road in Atlanta, another very expensive luxury home on Hilton Head Island, furnishings for his Atlanta residence, $100,000 in securities, and a $200,000 investment in a printing company.

C. D. Paradies' Involvement in the Loan/Purchase Transactions

The Paradies defendants claim that they did not know of Jackson's interest, and claimed that they were being prosecuted for making routine business payments to Hartsfield Concessions. (Paradies Co.'s Brief at pp. 6-7.) The government showed, however, that when Jackson picked up his check, D. Paradies himself would occasionally escort Jackson to the pertinent office. Additionally, D. Paradies' secretary testified that D. Paradies, Jackson, and others attended a meeting at D. Paradies' office. During the meeting, she was asked to draw up an agreement wherein Jackson was named as a minority participant. Later, she was asked to substitute Wilbourn's name for Jackson's, and to perform the highly unusual task of destroying the documents that named Ira Jackson.

Perhaps the most damning evidence of D. Paradies' involvement in this scheme was that which showed that D. Paradies himself actually helped Jackson fund the $275,000

loan/purchase made to/from Wilbourn. In April of 1987, the second installment of $125,000 was due from Jackson to Wilbourn. Around that time, D. Paradies made a $50,000 loan to Jackson and declared and paid a $50,000 dividend to Hartsfield Concessions on the same day. Jackson deposited the $100,000 into the Hartsfield Concessions bank account and paid off loans that were taken to fund the payment to Wilbourn. While D. Paradies' brother, Jimmy Paradies, testified at trial that the loan was made to help out Wilbourn because Wilbourn was experiencing financial difficulty, Wilbourn testified that he knew nothing about that loan. D. Paradies and Wilbourn were not even on speaking terms at the time. Additionally, Jackson signed a personal guarantee for the repayment of the loan, which was kept on file at the Paradies offices. Govt. Exhibit 33 (attached to Brief). In July of 1988, D. Paradies paid Hartsfield Concessions a dividend of $72,000. Jackson deposited the check and, the very next day, repaid the $50,000 loan to D. Paradies from the Hartsfield Concessions account.

Evidence also showed that on at least two occasions when Paradies needed the signatures of the minority participants, D. Paradies' employee sent the documents to Jackson, instructing him to obtain the signatures of Goldston or Wilbourn. *See* Govt. Exhibits 41, 42. D. Paradies' employee testified that he sent them to Jackson because at that point "everything was going through Ira."

D. Jackson's Acquisition of McClinton's 3% Interest Through Help of D. Paradies

In August, 1988, Hartsfield Concessions purchased McClinton's interest in Paradies Midfield for $11,000. At trial, McClinton testified that she was willing to sell because she had made almost no money from her venture. In fact, D. Paradies had instructed his employee to withhold McClinton's management fees or dividends because he "didn't like" McClinton. At the time of the sale, McClinton had accrued $11,455, of which she had no knowledge. After Hartsfield Concessions, via Jackson, paid McClinton the $11,000 purchase price, Midfield (via

D. Paradies) paid Hartsfield Concessions McClinton's $11,455 in back dividends. After the transfer, the management fees paid to Hartsfield Concessions were increased to 1.5%.

E. Jackson Uses Political Influence to Help the Paradies Companies

From the early 1980's on, the subconcessionaires were engaged in efforts to reduce their rent at the airport. Many amendments to Dobbs' contract with the City were made, reducing the rent that Dobbs charged the subconcessionaires, and in turn, reducing the revenues paid to the City from Dobbs. Jackson concealed his interest in the Paradies Companies, and used his position on the Council to advance the interests of the subconcessionaires.

In July of 1987, Jackson voted in favor of Amendment Number Five, which substantially reduced the rent charged to the subconcessionaires. The government claims that Amendment Five cost the city about $1 million. D. Paradies received $1.5 million of the total $2.3 million in rent reduction.

In 1989, Jackson supported another rent-reduction proposal that came before the board, and it included contract extensions for the subconcessionaires. Jackson was put on a negotiating team to represent the City against Dobbs. Some of the members of the team argued that only the smaller subconcessionaires should receive further rent reductions. Jackson argued adamantly that the larger subconcessionaires should also receive reductions. He was successful, and Amendment Number Six cost the City $7.7 million. D. Paradies saved over $2.5 million in rent. Interestingly, around the time Amendment Six was being negotiated, Hartsfield Concessions' management fees were raised to 2.0%. Richard Dickson, Paradies' "right hand man," testified that the increase was financially indefensible.

In October of 1990, the City's Commissioner of Aviation was to retire. The evidence showed that Jackson approached Mayor Maynard Jackson and asked to be appointed in the position. The mayor had heard rumors that Jackson had some kind of interest

in an airport concession, but received assurances from Jackson he owned no such interest. Jackson was eventually appointed Aviation Commissioner.

Soon after he took his position, Jackson proposed that the City terminate Dobbs' position as Principal Concessionaire and allow him, as Commissioner of Aviation, to take over the entire concessions program. The government claims that the program would have resulted in over $40 million reduction in revenue to the City. The proposal encountered substantial opposition, and Jackson became indignant toward opponents. The government claims that during the controversy, Paradies and Echols visited the Mayor and the City's Chief Administrative Officer to "lobby" them to stay close to Jackson and consider his proposal. (Govt.'s Brief at p. 27.) Jackson's proposal was put on the Council's agenda, but the CFO blocked the vote.

F. Jackson's Interest is Discovered

Shortly after the vote was blocked, the City Attorney and Mayor Jackson confronted Jackson about his interests. Jackson denied any financial connection with D. Paradies. On March 8, 1992, Jackson resigned his position, stating that "I now find that a loan which I extended to a sub-concessionaire at the airport some time ago, and which has long been repaid, has become an issue of concern." [12]

Soon thereafter, D. Paradies wrote a letter to Max Walker, the acting Commissioner of Aviation, stating that he was

> surprised and distressed to learn of Mr. Ira Jackson's alleged interest in and receipt of funds from Harts-field Concessions, Inc. . . At all times, Paradies Midfield has dealt with Hartsfield Concessions, Inc. through Mr. Mack Wilbourn, who represented him-self to be the sole owner of Hartsfield

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[12] In fact, Jackson caused papers to be backdated to make it appear that the "loan" had been paid as the investigation proceeded.

> Concessions, Inc. . . . Paradies is unaware of any alleged interest of Mr. Jackson in Hartsfield Concessions, Inc.

See Govt. Exhibit 106. The government claims that when the newspapers learned of the Goldston/Maudestine Simmons transaction, D. Paradies claimed that he did not know that Maudestine Simmons was Jackson's wife, even though he had hosted their wedding reception and "Mimi" was his own wife's close friend.

G. Direct Payoffs to City Council Members

The other scheme involved D. Paradies and his agreement to make corrupt payments with Echols to Atlanta City Council Members, including Jackson. Echols testified at trial that he and D. Paradies had been close for 22 years. He testified that he and D. Paradies had a long-standing agreement that Echols would make payments to certain council members, and that D. Paradies would reimburse him.

Echols testified that he made routine payments to Jackson, Buddy Fowlkes, and less frequent payments to Marvin Arrington, President of the City Council. Echols explained that between mid-1980 through 1992 he would meet Jackson for breakfast on Wednesday mornings at the Castlegate Hotel. Echols always paid for breakfast, and afterwards would pay Jackson several hundred dollars folded in a handshake. He had a similar routine with Fowlkes on Thursday mornings. Further, Echols paid for Fowlkes to fly back from vacation to vote for Amendment Six. Additionally, Echols paid for Fowlkes and his family to take a Florida vacation. As for Arrington, Echols paid him once or twice every two months, usually at breakfast, depending on what was before the Council. On two occasions, Echols paid Arrington to appoint Buddy Fowlkes to Chairman of the Transportation Committee. Echols paid $5,000 on one occasion, and $6,000 on another.

In 1987 and in 1990, D. Paradies allegedly reimbursed Echols for the payoffs. In 1987, D. Paradies paid Echols for "consulting

fees" in three payments of $10,000 each. Echols did not do any counselling for this money. Although consulting agreements were drawn up, Echols told Ron Wright that the money was not for consulting, but was for political payoffs.

In 1990, soon after Echols had flown Fowlkes back to vote for Amendment Six, D. Paradies reimbursed Echols in three payments for $1,666, $333, and $2,000. That time, no consulting agreements were drawn up; three "invoices" were sent to account for these payments.

The evidence also showed that Jackson accepted a $5,000 payoff from Echols and another subconcessionaire, Dave Gammill. In December of 1988, Gammill allegedly brought $25,000 in cash to Echols, who distributed the money to Jackson, Arrington, Fowlkes, and others.

H. Proceedings Below

On July 9, 1993, a federal grand jury returned a 133-count indictment charging the defendants with various offenses. Counts 1-83 charged all the defendants with mail fraud (one count for each check) in violation of 18 U.S.C. §§ 1341, 1346, and 2 based upon the scheme involving Jackson's interest in Paradies Midfield. Count 84 charged defendant Wilbourn, who was acquitted, of witness tampering in violation of 18 U.S.C. § 1512(b)(1). Count 85 charged D. Paradies with conspiring with Echols to violate 18 U.S.C. § 666 by making corrupt payments to public officials in violation of 18 U.S.C. § 371. Counts 86-128 charged Jackson with the receipt of corrupt payments from Echols in violation of 18 U.S.C. § 666. Counts 129-133 charged Jackson with subscribing to false income tax returns underreporting his income in violation of 26 U.S.C. § 7206(1).

At trial, Jackson denied the charges against him, maintaining that his dealings with Wilbourn, D. Paradies, and others were neither illegal nor fraudulent. He claimed he acted upon the advice of his attorney and his accountant. D. Paradies and his companies claimed that under their concession contracts at the Atlanta airport under Atlanta ordinances they were required to

enter into minority participation agreements with persons such as Wilbourn and others in their business enterprises. They denied knowingly doing anything unethical, illegal, or fraudulent, or having knowledge of Jackson's allegedly fraudulent activity and conflicts of interest. D. Paradies and his companies particularly contended that they only made contractually obligatory payments of dividends and fees to Jackson and others.

The jury was sequestered, and the case was tried for three straight weeks, including weekends. After six hours of deliberations, the jury returned a verdict of guilty for all defendants on all counts, except for Jackson's acquittal as to Count 129, and Wilbourn's acquittal. Jackson received 42 months in prison, a $7,500 fine and a special assessment of $6,500. Paradies received 33 months in prison, a $7,500 fine and a special assessment of $4,200. The Paradies Shops was fined $1,500,000 and assessed $16,600. Paradies Midfield was assessed $16,600. Jackson and D. Paradies remain free on appeal bonds. The fine imposed on the Paradies Shops was stayed pending appeal.

II. ANALYSIS[13]

A. Jury Selection

According to the Jury Selection and Service Act ("the Jury Selection Act"), 28 U.S.C. §§ 861, *et seq.*, the court may excuse a potential juror (1) upon a showing of undue hardship or extreme inconvenience, or (2) if the potential juror may be unable to render impartial jury service or that his service as a juror would

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[13] In addition to the issues discussed in this opinion, the defendants raised other less meritorious ones. We find that those issues do not warrant discussion, and "summarily affirm the district court as to all issues not herein discussed." *See United States v. Waymer*, 55 F.3d 564, 568 (11th Cir.1995), *cert. denied*, — U.S.—, 116 S.Ct. 1350, 134 L.Ed.2d 519 (1996).

be likely to disrupt the proceedings.[14] *See* 28 U.S.C. § 1866(c). In this case, the district court sent a 25-page, 108- question jury questionnaire to over 250 potential jurors.[15] The court reviewed the returned questionnaires and excused over 70 potential jurors pursuant to § 1866(c) and in accordance with the Local Plan for the Northern District of Georgia ("Local Plan"). Jackson and the Paradies defendants argue that the district court committed a "substantial violation" of the Jury Selection Act by excusing those jurors *sua sponte* prior to voir dire, because the questionnaires provided insufficient evidence of actual bias and undue hardship.[16] The district court's determinations regarding bias

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[14] Section 1866(c) provides in pertinent part:

> [A]ny person summoned for jury service may be (1) excused by the court . . . upon a showing of undue hardship or extreme inconvenience, . . . or (2) excluded by the court on the ground that such person may be unable to render impartial jury service or that his service as a juror would be likely to disrupt the proceedings, or (3) excluded upon peremptory challenge as provided by law, or (4) excluded pursuant to the procedure specified by law upon a challenge by any party for good cause shown, or (5) excluded upon determination by the court that his service as a juror would be likely to threaten the secrecy of the proceedings, or otherwise adversely affect the integrity of jury deliberations.

28 U.S.C. § 1866(c).

[15] While the district court entered an Order on July 11, 1994, stating that there were "approximately 250" jurors in the venire, this court found two groups of juror questionnaires, one included approximately 150 jurors, and the other included an even larger number. Whatever the actual number, it was an unusually large venire.

[16] Jackson stated in his brief that the court's excusal of certain jurors violated his "Sixth Amendment right to a fair trial." The substance of his brief, however, refers only to the Jury Selection Act, not to the Sixth Amendment. *See* Jackson's Brief at pp. 16-21. His reference to the Sixth Amendment may be a method by which Jackson seeks to avoid the strict timeliness requirements of a statutory claim. *United States v. Grisham*, 63 F.3d 1074, 1077 (11th Cir.1995) (allowing constitutional

and undue hardship are reviewed for an abuse of discretion. *See United States v. North*, 910 F.2d 843, 909-10 (D.C.Cir.1990), *modified on other grounds*, 920 F.2d 940 (D.C.Cir.1990), *cert. denied*, 500 U.S. 941, 111 S.Ct. 2235, 114 L.Ed.2d 477 (1991).

A party challenging the jury selection process under the Jury Selection Act must make his challenge "before the voir dire examination begins, or within seven days after the defendant discovered or could have discovered, by the exercise of diligence, the grounds therefor, *whichever is earlier*." 28 U.S.C. § 1867(a) (emphasis added). The timeliness requirement "is to be strictly construed, and failure to comply precisely with its terms forecloses a challenge under the Act." *United States v. Bearden*, 659 F.2d 590, 595 (5th Cir. Unit B 1981), *cert. denied*, 456 U.S. 936, 102 S.Ct. 1993, 72 L.Ed.2d 456(1982). Therefore, once voir dire begins, Jury Selection Act challenges are barred, even where the grounds for the challenge are discovered only later. *See United States v. Hawkins*, 566 F.2d 1006, 1013 (5th Cir.), *cert. denied*, 439 U.S. 848, 99 S.Ct. 150, 58 L.Ed.2d 151 (1978); *United States v. Kennedy*, 548 F.2d 608, 613 (5th Cir.), *cert. denied*, 434 U.S. 865, 98 S.Ct. 199, 54 L.Ed.2d 140 (1977). Jackson admits in his brief that his counsel learned of the juror excusals during the weekend immediately before trial and that, therefore, he did not make his challenge to the jury selection process until the first day of trial. Jackson does not attempt to excuse his failure to comply with the timeliness requirements of

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claims even though statutory claim is untimely), *cert. denied*, — U.S. —, 116 S.Ct. 798, 133 L.Ed.2d 746 (1996). In any event, we will address only the merits of Jackson's statutory claim. Any constitutional claim raised by Jackson would fail for the same reasons as does the same claim made by the Paradies defendants. *See, infra*, note 28 and accompanying text.

the statute. Under these circumstances, Jackson's challenge is barred.[17]

The Paradies defendants, however, filed a timely motion under the Jury Selection Act and submitted an affidavit in support thereof. The Act requires that any motion filed pursuant thereto be accompanied by "a sworn statement of facts which, if true, would constitute a substantial failure to comply with the provisions of [the Act]." 28 U.S.C. § 1867(d). When that requirement is not satisfied, the challenge to the selection process must fail, because "Congress left no room for ad hoc review of the usefulness of compliance with [the sworn statement] requirement." *Kennedy*, 548 F.2d at 613; *see also United States v. Maldonado*, 849 F.2d 522, 523 (11th Cir.1988) (the Act's "sworn statement" requirement is to be strictly construed); *United States v. Green*, 742 F.2d 609, 612 (11th Cir.1984) (compliance with the Act's procedural requirements is necessary to challenge the validity of a jury selection plan).

The "sworn statement" submitted by the Paradies defendants was the affidavit of a rejected juror, Dana Shepherd. Shepherd's affidavit showed, by tracking the statutory language, that she was excused from serving on the jury in this case despite the fact that (1) she would have met the basic requirements to serve on the "qualified wheel" of potential jurors, (2) she was not a member of an occupational class or group of persons who are exempted from jury service, and (3) she did not have a basis on which she could have individually requested excusal from jury service.[18]

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[17] Even if we were to consider Jackson as having impliedly joined with the Paradies defendants' timely motion, his challenge under the Jury Selection Act would fail for the same reasons as does the challenge of his codefendants.

[18] Shepherd showed that she met the minimum requirements under the Local Plan by attesting that she (1) is over the age of 18, (2) is competent to fill out the affidavit, (3) received, completed, and returned the jury questionnaire sent to her by the court, (4) had been excused from serving on the *Jackson* case but was to remain on call for a

In other words, she has met the minimum requirements to be placed on the qualified wheel of potential jurors. The affidavit does not show, however, that there could be no other reason upon which the court could have based its decision to excuse her, *e.g.*, undue hardship or bias. Therefore, the affidavit does not state facts which, if true, would constitute *any* violation of the Jury Selection Act.[19] Consequently, the Paradies defendants failed to satisfy the "sworn statement" prerequisite to a claim under the Act, and their challenge thereunder is precluded.

Even if we were to assume that Shepherd's affidavit satisfied the requirements of § 1867(d), we would find that the district court did not "substantially fail" to comply with the Jury Selection Act. *See* 28 U.S.C. § 1867(d) (allowing relief under

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two-week term, (5) is a citizen of the United States and has been a resident of Atlanta, Georgia, for over one year, (6) is able to read, write, and understand the English language with sufficient proficiency to fill out the questionnaire, (7) is able to speak the English language, (8) has not been convicted of a felony, (9) is not in active service in the armed forces, (10) is not a member of the Fire or Police Department, (11) is not a public officer, (12) has not served on a grand or petit jury in the federal court in the past two years, (13) does not have active care and custody of small children, (14) is not essential to the care of aged or infirm persons, (15) is not over 70 years of age, and (16) is not a part of volunteer safety personnel. The language of her affidavit almost exactly tracks the language in the Local Plan. *See* N.D.Ga.Local Rule 120-1, Appendix A, §§ I, VII, & VIII (incorporating 28 U.S.C. § 1865).

[19] The Paradies defendants do not even claim that the district court's excusal of Dana Shepherd was improper. In fact, she stated in her questionnaire that she "regularly" saw H. Lamar Mixon (a named partner in the law firm representing Paradies Midfield), with whom she had a "godmotherly" relationship. Moreover, she virtually admitted her inability to render impartial service when she stated that she had met D. Paradies several times and "would feel funny" being in the courtroom with him. Under these circumstances, it would have been difficult for Ms. Shepherd to execute an affidavit that would have satisfied the requirements of § 1867(d).

the Act "[i]f the court determines that there has been a substantial failure to comply with the [Act]"). A Jury Selection Act violation is substantial only if it frustrates the Act's two basic goals: "(1) random selection of juror names; and (2) use of objective criteria for determination of disqualifications, excuses, exemptions, and exclusions."[20] *United States v. Gregory*, 730 F.2d 692, 699 (11th Cir.1984), *cert. denied*, 469 U.S. 1208, 105 S.Ct. 1170, 1171, 84 L.Ed.2d 321 (1985).

The Paradies defendants claim that thirteen jurors, individually, were improperly excused for bias, and eight jurors were improperly excused for undue hardship.[21] They argue that the questionnaires of the jurors excluded for bias did not contain sufficient evidence of *actual* bias, citing *United States v. Calabrese*, 942 F.2d 218 (3d Cir.1991), and that the questionnaires of the jurors excluded for hardship did not show that the potential jurors would suffer hardship for the reasons listed in the Local Plan. Additionally, they claim that seventeen questionnaires are "missing" for unknown reasons, and that their lack of access to those documents impedes their ability to assess whether the trial court acted in an appropriate manner.

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[20] The relief to be afforded for a "substantial violation" under the Act is not reversal, but it is a stay of the proceedings for the court to make a determination regarding the propriety of the jury selection process. *See* 18 U.S.C. § 1867(d).

[21] The Paradies defendants did not claim that the basic process for choosing jurors in the Local Plan was unconstitutional. *See United States v. Pepe*, 747 F.2d 632, 648-49 & n. 17 (11th Cir. 1984) (citing *Duren v. Missouri*, 439 U.S. 357, 99 S.Ct. 664, 58 L.Ed.2d 579 (1979)). In order to substantiate a claim that the process was defective, the defendants would have had to show, among other things, that the district court was excluding a distinctive group in the community from the jury venire, and that the underrepresentation of that group was due to the systematic exclusion of the group in the selection process. *Id.* These defendants could not support such a claim, because they do not even identify any specific group that is excluded due to the process outlined in the Local Plan.

This court has carefully reviewed all of the questionnaires challenged by the defendants, and we find that the district court did not commit a substantial violation of the Act in excluding those jurors. With respect to those who were excused for bias, every potential juror either professed that they were badly prejudiced against one side, or they described a relationship that the court deemed inappropriate for a juror in this case.[22] We find that this action by the district court was not, nor was it alleged to have been, directed to any ethnic, racial, or national origin, nor did it constitute any arbitrary, unreasonable exclusion of discrete segments of the venire. Nor did the court's action in this respect cause the venire to consist of anything other than a fair cross-section of the community. This court has rejected a similar challenge to a district court's excusal of jurors "who merely acknowledged their acquaintance" with the defendant. *United States v. Bailey*, 468 F.2d 652, 658 (5th Cir.1972) (quoting *Dennis v. United States*, 339 U.S. 162, 168, 70 S.Ct. 519, 521, 94 L.Ed. 734 (1950)). The *Bailey* court relied on the district court's "serious duty to determine the question of actual bias and a broad discretion in its rulings" in dismissing the defendant's challenge to the jury composition.[23] *Id.* (finding

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[22] The jurors listed the following circumstances relating to bias: (# 27) stepfather was married to Jackson's sister; (# 66) husband is prosecuting attorney in Cobb County; (# 84) friend of and worked for Jackson; (# 87) worked for Paradies; (# 113) worked as consultant to the city and Mr. Cook (attorney for Paradies) is son-in-law's friend; (# 128) mother works for Judge Shoob (niece of Paradies); (# 138) works for IRS; (# 153) parents are friends of Paradies; (# 270) had clear perception that dishonest business was involved at airport; (# 297) first cousin of district attorney; (# 343) prejudiced, but requested excusal for medical reasons; (# 376) prejudiced against the defendants. Only one "bias" juror's questionnaire, (# 89), was not found in the record. The district court, however, stated that that juror suspected shenanigans at the airport, and this court has been given no reason to discount that finding of the court.

[23] We recognize that *Bailey* dealt with challenges, rather than *sua sponte* action, but the decision establishes that the district court had broad discretion in dismissing jurors who have friendships, acquaintances, and

"nothing abusive or prejudicial in the excusal of jurors admittedly acquainted, regardless [of] how remotely, with one of the parties to the proceedings"). The Paradies defendants rely on *Calabrese* wherein the Third Circuit rejected the notion that the district court has the broad discretion allowed by the Fifth Circuit in *Bailey*. *Calabrese* is not binding on this court, however, and it is our view that the reasoning in *Bailey* governs this case.[24] *See United States v. Perkins*, 748 F.2d 1519, 1532-33 (11th Cir.1984) ("A relationship between a juror and defendant, albeit a remote one, can form the basis of a challenge for cause."); *see also North*, 910 F.2d at 909-10 (upholding excusal of jurors before voir dire based on juror questionnaires); *United States v. Redmond*, 546 F.2d 1386, 1389 (10th Cir.1977) (upholding excusal of jurors who were acquainted with any attorneys in the case), *cert. denied*, 435 U.S. 995, 98 S.Ct. 1645, 56 L.Ed.2d 83 (1978).

Similarly, the court did not err in excluding the eight jurors for undue hardship. The Paradies defendants argue that the court allowed some jurors to use a hardship excuse for reasons other than those named in the statute. For example, juror # 290 was excused for having two small children, but her two children were sixteen years old. The Local Plan, however, allows a hardship excuse to potential jurors with children under ten years of age.

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other connections with parties to the lawsuit.

[24] In any event, *Calabrese* is clearly distinguishable on its facts. In that case, the district court judge sent out a form letter to approximately 300 jurors, and asked two main questions, (1) Do you know the defendants, and (2) Will you be able to serve on a four to six week trial. All of the potential jurors who answered "yes" to the first question were excused. The Third Circuit found that this "acquaintance-based excusal" was inappropriate under the Act. *Calabrese*, 942 F.2d at 226. The method of the district court in *Calabrese* was notably different from the method of the district court in this case. Here, the jurors' questionnaire was 25 pages long and consisted of over 100 questions, and explanations for each answer was requested therein. Therefore, this case involved "far more compelling connection than mere acquaintance." *Id.* (distinguishing cases involving more than mere acquaintance).

The defendants also criticized the court for excusing some of these jurors even though the jurors did not request excusal. Again, this court has reviewed all of the available questionnaires, and we find no substantial error in the court's actions.[25] While the court may have violated some of the technical provisions of the Local Plan in dismissing some jurors and without one of the enumerated hardships, none of the excusals frustrated the goals of the Act. *See United States v. Gregory,* 730 F.2d 692, 700 (11th Cir.1984) (technical violations alone do not give rise to a substantial violation of the Act), *cert. denied,* 469 U.S. 1208, 105 S.Ct. 1170, 1171, 84 L.Ed.2d 321 (1985); *see also United States v. Barnette,* 800 F.2d 1558, 1568-69 & n. 14 (11th Cir.1986) (upholding district court's granting of hardship excuse to 245 out of 249 jurors after a personal, pre-voir dire review of juror questionnaires), *cert. denied,* 480 U.S. 935, 107 S.Ct. 1578, 94 L.Ed.2d 769 (1987). Additionally, under § 1869(j) of the Jury Selection Act, "undue hardship and extreme circumstances" includes "any other factor which the court determines to constitute an undue hardship or extreme inconvenience to the juror." In the instant case, where the jury would be sequestered for several weeks, the court has broad discretion in determining whether a particular juror could be excluded because of undue hardship. Finally, defense counsel's failure to locate a small portion of the juror questionnaires (some of which were never returned), from literally hundreds of questionnaires comprising several boxes in the record of this case, is no basis for a finding of failure on the

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[25] The jurors listed the following circumstances relating to undue hardship: (# 7) mother is 87 years old and in nursing home; (# 60) has hear-ing problems, needs hearing aid; (# 195) has three children seven years and younger; (# 254) has two children, ages four and two; (# 276) no questionnaire, judge released him on grounds of hard-ship; (# 290) two small children, both sixteen years old; (# 294) sent note in lieu of questionnaire, has two children, ages five and two; (# 340) requested excusal for business hardship, but also professed that he "assume[d] Jackson and other defendants are guilty."

part of the district court to follow legal procedures in jury selection.[26]

We note that the district court in this case was faced with an onerous burden in arriving at an impartial jury in this high-profile case that was originally estimated to last four to six weeks.[27] With great care, the court reviewed all of the returned jury questionnaires to rule out those jurors who would have been unduly burdened by serving on a case of that duration who admittedly would have been unable to render impartial jury service. Under these circumstances, the district court in no way hindered the random selection of juror names or the use of objective criteria in excusing jurors. Nor did the process result in impermissible discrimination or arbitrariness, and the defendants do not make such an allegation. In sum, the court did not commit a substantial violation of the Jury Selection Act, and the Paradies defendants are not entitled to a reversal on that basis.[28]

The Paradies defendants also claim, as a separate basis for reversal, that the district court violated their unqualified right to inspect the jury records in order to substantiate their claim under the Jury Selection Act. At about 8:00 on the morning of voir dire, after approximately 115 potential jurors had been summoned to appear in court at 11:00 a.m. for the proceedings, the Paradies defendants moved the court to stay the proceedings on the ground that the court possibly committed a substantial failure to comply

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[26] The Paradies defendants did not object to the jury finally impaneled. They did, however, make an unsuccessful challenge based on *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), but the district court's ruling on that issue was not asserted as an error on appeal.

[27] Indeed, the Paradies defendants moved for a change of venue because of claimed widespread prejudicial publicity in Atlanta.

[28] For the same reasons, any argument based on the Sixth Amendment right to a fairly selected and impartial jury would also fail. *See Green*, 742 F.2d at 611.

with the provisions of the Act. The district court denied the motion for the stay, rejecting the defendants' argument that the exclusion of Dana Shepherd from the jury venire may have been a violation of the Jury Selection Act. Later that same day, the court read into the record its reasons for excusing the jurors that it dismissed *sua sponte*. The court thereafter, upon defendants' request, made the jury questionnaires a part of the record. Additionally, after trial, the court allowed the defendants to supplement the record with additional jury selection materials. At no time did the court preclude defense counsel from inspecting the record and finding out which jurors the court had excused. On the contrary, the record shows that the court entered an order on November 8, 1993, directing all counsel not to disclose answers of prospective jurors because that information was deemed to be privileged. From that date on, counsel for both sides were presumably aware that the questionnaires existed and that counsel would be entitled to review them. At most, the court denied the Paradies defendants additional time to formulate their argument. Therefore, we find, after careful examination of this record, that these defendants were not denied access to the jury selection documents.

B. Propriety of the Convictions Pursuant to 18 U.S.C. § 1346

Jackson and the Paradies defendants challenge their convictions pursuant to 18 U.S.C. § 1346 on several grounds. First, the Paradies defendants claim that in order to be convicted for aiding and abetting in the fraudulent scheme, an independent duty to the victim must first exist and that duty must have been breached. Second, they claim that § 1346 is unconstitutionally vague, or, in the alternative, that the district judge should have given the jury a "fair warning" instruction to allow the jury to make the vagueness determination. Finally, Jackson claims that his convictions under § 1346 violated the *ex post facto* clause of the Constitution. We will discuss each issue in turn.

(1) Independent Duty

The Paradies defendants argue that because the Paradies companies had no legal duty to anyone to prevent Jackson's

scheme from succeeding, then they cannot be held liable for aiding and abetting him in that scheme. The defendants rely heavily on *Dirks v. S.E.C.*, 463 U.S. 646, 103 S.Ct. 3255, 77 L.Ed.2d 911 (1983), and *Chiarella v. United States*, 445 U.S. 222, 100 S.Ct. 1108, 63 L.Ed.2d 348 (1980), wherein the Supreme Court found that a defendant cannot be convicted for securities fraud (*Dirks*), or for aiding and abetting securities fraud (*Chiarella*), unless he breached a legal duty. Because the Paradies companies claim that they merely made routine, lawful fee and dividend payments to Hartsfield Concessions and had no independent duty to disclose anything about their shareholder's fraudulent scheme, they cannot be convicted for helping Jackson in that scheme. They contend that "without access to the opinion of the Ethics Board, the Paradies defendants were lulled into a false sense of security that there was nothing inherently improper about the relationship between Wilbourn and Jackson." The government readily admits that the Paradies defendants were not fiduciaries to the City. It claims, however, that this circuit does not require that an independent duty exist in order to be convicted of aiding and abetting in a mail fraud scheme.

This court has addressed this issue in a recent case, *United States v. Waymer*, 55 F.3d 564, 568 (11th Cir.1995), *cert. denied*, — U.S. —, 116 S.Ct. 1350, 134 L.Ed.2d 519 (1996). In *Waymer*, the defendant was a member of the Atlanta Board of Education, and he used his status to award service contracts to certain companies in return for monetary benefits. Waymer was convicted of mail fraud, because he mailed payments to the contractors for the services they rendered. He contended that because the school system had a legal obligation to make those payments, the mailing of the checks to pay a legal debt could not provide a basis on which to satisfy the mailing requirement of § 1341. In upholding his conviction, this court relied on *Schmuck v. United States*, 489 U.S. 705, 710, 109 S.Ct. 1443, 1447, 103 L.Ed.2d 734 (1989), wherein the Supreme Court found that mailings that furthered the overall scheme to defraud would satisfy the mailing requirement of § 1341, even though the mailings may have been otherwise legal. The *Waymer* court

found that it was presented with an even stronger case than in *Schmuck*, because the checks mailed to the contractor were the very source of the illegal payments to Waymer; if the contractors did not get paid, neither did Waymer.[29] *Waymer*, 55 F.3d at 570.

Although the Paradies companies routinely mailed out fee and dividend checks, the government showed that those payments were made in exchange for Jackson's political influence. Under the reasoning in *Waymer*, those mailings can serve as the basis for a conviction under § 1341. Additionally, the Paradies defendants do not cite to one mail fraud case to support their theory that an independent duty *must* exist between the defendant and the victim. This court stated in *Waymer* that "[a] defendant's breach of a fiduciary duty may be a predicate for a violation of the mail fraud statute where the breach entails the violation of a duty to disclose material information." *Id.* at 571 (emphasis added). That predicate is inapplicable to the facts of this case, however, because the Paradies defendants were not charged with a failure to disclose a material fact; they were charged with aiding and abetting by *actively participating* in the crime. Jackson certainly had a fiduciary duty to the City. Using the mails to deliver dividend checks and fees, if intentionally designed as a payoff to Jackson, is clearly sufficient to convict the Paradies defendants for aiding and abetting the fraud under § 1346.

(2) Vagueness

The Paradies defendants also argue that § 1346, which punishes schemes to defraud another of the intangible right of honest services, is unconstitutionally vague. Whether a statute is vague is a question of law to be reviewed *de novo*. *Dodger's Bar & Grill, Inc. v. Johnson County Bd. of County Comm'rs*, 32 F.3d 1436, 1443 (10th Cir.1994).

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[29] Furthermore, the Waymer court also held specifically that the required element of " 'mailing' . . . need not be an essential element of the scheme." *Waymer*, 55 F.3d at 569 (citing *Schmuck*, 489 U.S. at 710, 109 S.Ct. at 1447).

This question was also addressed by the *Waymer* court, and it rejected the same challenge on strikingly similar facts. First, the court reasoned that "[a] statute is not unconstitutionally vague if it 'define[s] the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.'" *Waymer*, 55 F.3d at 568 (quoting *Kolender v. Lawson*, 461 U.S. 352, 357, 103 S.Ct. 1855, 1858, 75 L.Ed.2d 903 (1983)). It should be plain to ordinary people that offering and accepting large sums of money in return for a city councilman's vote is the type of conduct prohibited by the language of § 1346.[30] This is a specific intent crime, and the

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[30] The contentions of defendants who claim that it is unclear whether their conduct is covered by § 1346 have a hollow ring, because until the Supreme Court's decision in *McNally v. United States*, 483 U.S. 350, 107 S.Ct. 2875, 97 L.Ed.2d 292 (1987), federal courts had uniformly construed the mail fraud statute to cover the situation where public officials received bribes and kickbacks thereby depriving the citizenry of their "intangible rights" to good and honest government. *See, e.g., United States v. Holzer*, 816 F.2d 304 (7th Cir.), *rev'd*, 828 F.2d 21 (7th Cir.1987), *cert. denied*, 484 U.S. 1076, 108 S.Ct. 1054, 98 L.Ed.2d 1016 (1988); *United States v. Silvano*, 812 F.2d 754 (1st Cir.1987); *United States v. Clapps*, 732 F.2d 1148 (3d Cir.), *cert. denied*, 469 U.S. 1085, 105 S.Ct. 589, 83 L.Ed.2d 699 (1984); *United States v. Barber*, 668 F.2d 778 (4th Cir.), *cert. denied*, 459 U.S. 829, 103 S.Ct. 66, 74 L.Ed.2d 67 (1982); *United States v. Margiotta*, 688 F.2d 108 (2d Cir.1982), *cert. denied*, 461 U.S. 913, 103 S.Ct. 1891, 77 L.Ed.2d 282 (1983); *United States v. Diggs*, 613 F.2d 988 (D.C.Cir.1979), *cert. denied*, 446 U.S. 982, 100 S.Ct. 2961, 64 L.Ed.2d 838 (1980); *United States v. States*, 488 F.2d 761 (8th Cir.1973), *cert. denied*, 417 U.S. 909, 94 S.Ct. 2605, 41 L.Ed.2d 212 (1974); *Shushan v. United States*, 117 F.2d 110 (5th Cir.1941), *cert. denied*, 313 U.S. 574, 61 S.Ct. 1085, 1086, 85 L.Ed. 1531, 1532 (1941); *see also, United States v. McNally*, 790 F.2d 1290 (6th Cir.1986) (*per curiam*). In *McNally*, however, the Supreme Court held that § 1346 did not prohibit schemes to deprive the public of the honest services of elected officials. Congress enacted § 1346 to reinstate the *pre-McNally* rule that such schemes are prohibited by the mail fraud

jury was properly instructed on that intent. *See discussion, infra*, at pp. 1284-86. Additionally, the evidence was overwhelming that these defendants "intended to defraud the citizens of Atlanta of [Jackson's] honest services." *Id.* at 569. Therefore, the vagueness challenge must fail.

The defendants argue that the Fifth Circuit's decision in *United States v. Brumley*, 79 F.3d 1430 (5th Cir.), *reh'g en banc granted*, 91 F.3d 676 (5th Cir.1996), supports its position. In that case, the court found that Congress did not intend that § 1346 overrule the decision in *McNally v. United States*, 483 U.S. 350 (1987), discussed *supra* at note 30. That position, however, is contrary to this court's holding in *Waymer*, a case that the *Brumley* court specifically declined to follow.[31] *Compare Waymer*, 55 F.3d at 568 with *Brumley*, 79 F.3d at 1441; *see also United States v. Bryan*, 58 F.3d 933 (4th Cir.1995) (finding that Congress intended that § 1346 overrule *McNally*); *United States v. Martinez*, 905 F.2d 709, 715 (3d Cir.), *cert. denied*, 498 U.S. 1017, 111 S.Ct. 591, 112 L.Ed.2d 595 (1990) (observing that "Congress' purpose in enacting § 1346 was to restore the mail fraud statute to its pre-*McNally* position"). Therefore, we reject the defendants' reliance on *Brumley* because this court has already held that Congress intended to extend the reach of the wire fraud

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statute. According to the dissent in *McNally*, the Supreme Court decision reversed "the accumulated wisdom of many distinguished federal judges who have thoughtfully considered and correctly answered" the "intangible rights" questions. *McNally*, 483 U.S. at 376, 107 S.Ct. at 2890 (Stevens, J., dissenting). Government officials, including defendant Jackson, were on notice, then, until June 24, 1987, the date of the *McNally* decision—and after November 18, 1988—that such intentional actions as are charged in the indictment now at issue were deemed illegal under the mail fraud statute.

[31] We agree with Judge Wood's dissent in *Brumley*, 79 F.3d at 1452.

proscription to schemes to deprive another of "the intangible right of honest services."[32]

The Paradies defendants claim that even if § 1346 is not vague as a matter of law, they were entitled to a "fair warning" instruction to allow the jury to make the determination regarding vagueness. They requested that the court ask the jury whether the terms of the statute were "so vague that men of common intelligence" in the position of the Paradies defendants would not have had fair warning of a change in the law and that they would not have known they were prohibited from paying dividends or management fees to Hartsfield Concessions after the effective date of the statute. The court rejected that request, deciding the vagueness issue as a matter of law. We agree that the issue of whether a statute is void for vagueness is a question of law for the court to determine. *See, e.g., Dodger's Bar & Grill, Inc.*, 32 F.3d at 1443; *United States v. Nevers*, 7 F.3d 59, 61 (5th Cir.1993), *cert. denied*, 510 U.S. 1139, 114 S.Ct. 1124, 127 L.Ed.2d 432 (1994). Therefore, the Paradies defendants were not entitled to a "fair warning" instruction to the jury.

(3) The Ex Post Facto Clause

Jackson claims that his convictions pursuant to § 1346 violated his rights under the *ex post facto* clause of the Constitution, because the crimes for which he was convicted were committed

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[32] *See also* the legislative history comments of Representative Conyers in 134 Cong.Rec. H11,108-01 (daily ed. Oct. 21, 1988), *quoted in Brumley*, 79 F.3d at 1436:

> This amendment restores the mail fraud provision to where that provision was before the *McNally* decision. . . .
>
> The amendment adds a new section to 18 U.S.C. 63 that defines the term "scheme or artifice to defraud to include a scheme or artifice to defraud another of the intangible right of honest services." Thus, it is no longer necessary to determine whether or not the scheme or artifice to defraud involved money or property. This amendment is intended merely to overturn the *McNally* decision.

prior to the effective date of § 1346 (November 18, 1988), a time when the mail fraud statute (§ 1341) applied only to fraudulent schemes that deprived individuals of property rights, not intangible rights.[33] *See McNally v. United States*, 483 U.S. 350, 107 S.Ct. 2875, 97 L.Ed.2d 292 (1987), discussed *supra* at note 30. We find this argument to be meritless. There was sufficient evidence upon which the jury could have found that Jackson's fraudulent scheme began in 1985 but continued until the end of his tenure as a councilman (1990). In the *ex post facto* analysis, "[t]he critical question is whether the law changes the legal consequences of acts *completed* before its effective date." *Weaver v. Graham*, 450 U.S. 24, 31, 101 S.Ct. 960, 965, 67 L.Ed.2d 17 (1981) (emphasis added). Several circuits have upheld convictions under similar circumstances. *See United States v. Garfinkel*, 29 F.3d 1253, 1259-60 (8th Cir.1994) (upholding conviction under § 1346 when scheme began in 1986 and continued through 1989); *United States v. Hammen*, 977 F.2d 379, 385 (7th Cir.1992) (upholding conviction under § 1346 when bank fraud scheme spanned effective date of the statute); *United States v. Alkins*, 925 F.2d 541, 549 (2d Cir.1991) (convictions for mail fraud upheld because defendants permitted the mailings to occur after the effective date of the statute). Accordingly, Jackson's mail fraud convictions for conduct that continued after the effective date of § 1346 do not violate the *ex post facto* clause.

C. Jury Instructions

The Paradies defendants claim that the district court erred in instructing the jury on "specific intent" and in failing to give the "theory of the defense" instruction that it proposed at trial. We will address those issues separately.

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[33] It is undisputed that each of the mailings that served as a basis for Jackson's convictions were mailed after November 18, 1988, the effective date of the statute.

(1) Specific Intent

The Paradies defendants first argue that the district court erred in charging the jury on specific intent, because it failed to require the jury to find that the defendants knew that their conduct was against the law, and that "ignorance of the law" is a valid defense because mail fraud is a specific intent crime. The court refused to instruct the jury in this fashion and, instead, instructed the jury that the defendants must have had the specific intent *to defraud*, rather than an intent to violate the law. Again, the Paradies defendants do not cite one mail fraud case to support their position. Instead, they cite to precedent that supports the general proposition that ignorance of the law may be a defense to a specific intent crime. *See Ratzlaf v. United States*, 510 U.S. 135, 114 S.Ct. 655, 126 L.Ed.2d 615 (1994) (antistructuring law); *United States v. Schilleci*, 545 F.2d 519 (5th Cir.1977) (wire fraud conspiracy); *United States v. Davis*, 583 F.2d 190 (5th Cir.1978) (conspiracy to export).

While mail fraud can be classified as a "specific intent" crime, it is clear from a review of the pertinent case law that the defendants' contention is unfounded. In mail fraud cases, the government need only prove that the defendant had the intent to deceive, and ignorance of the law is no defense. *See Waymer*, 55 F.3d at 568 (defendant need only show the "specific intent to defraud"); *United States v. Hooshmand*, 931 F.2d 725, 731 (11th Cir.1991) (intentional participation in a scheme to defraud); *Pelletier v. Zweifel*, 921 F.2d 1465, 1499 (11th Cir.) ("conscious knowing intent to defraud"), *cert. denied*, 502 U.S. 855, 112 S.Ct. 167, 116 L.Ed.2d 131 (1991); *United States v. Williams*, 728 F.2d 1402, 1404 (11th Cir.1984) (specific intent to defraud); *United States v. O'Malley*, 707 F.2d 1240, 1247 (11th Cir.1983) (same). The Second Circuit stated specifically, "The specific intent required under the mail fraud statute is the intent to defraud, . . . and not the intent to violate a statute." *United States v. Porcelli*, 865 F.2d 1352, 1358 (2d Cir.), *cert. denied*, 493 U.S. 810, 110 S.Ct. 53, 107 L.Ed.2d 22 (1989). Also, the Tenth Circuit has specifically held under similar circumstances that the district court did not err in instructing the jury that

"every person is presumed to know what the law forbids." *United States v. Hollis*, 971 F.2d 1441, 1451-52 (10th Cir.1992), *cert. denied*, 507 U.S. 985, 113 S.Ct. 1580, 123 L.Ed.2d 148 (1993). In light of the foregoing, we must reject the Paradies defendants' argument on this point.

Next, they argue that the court gave, in substance, a general intent instruction rather than a specific intent instruction. The district court instructed the jury as follows:

> Now, fraudulent intent is necessary to sustain a charge of a scheme to defraud.
>
> Now, in that regard, intent and motive should not be confused. Motive is what prompts a person to act while intent refers to the state of mind with which the act is done.
>
> So, if you find beyond a reasonable doubt that the acts constituting the crime charged were committed by the defendant under consideration voluntarily, with a specific *intent to do something the law forbids*, then the element of "willfulness", as defined in these instructions has been satisfied *even though the defendant may have believed his conduct was* either religiously, politically, morally or otherwise *required*, or that ultimate good would result from such conduct.
>
> *On the other hand, if you have a reasonable doubt as to whether the defendant acted in good faith*, sincerely believing himself to be exempt by the law, then he did not intentionally violate a known legal duty; that is, he did not act "willfully," and that essential part of the offense has not been established.

The court reiterated the specific intent requirement in other parts of the charge. *See, e.g.*, these instructions: "What must be proved and proved beyond a reasonable doubt is that the defendant knowingly and willfully devised or intended to devise a scheme to defraud substantially the same one that is alleged in the indictment, and that the use of the United States mail was closely related to the scheme." (R48-4252). "[T]he question is, did the defendant intend to deceive and defraud?" (R48-4252-53); "Now,

the Government must prove beyond a reasonable doubt that these [Paradies] defendants aided, abetted, counseled, or caused mail fraud to be committed with the specific intent that each and every element of the crime of mail fraud be committed by some person." (R48-4261). "Now, in this case good faith is a complete defense . . . because good faith on the part of the defendants is inconsistent with the intent to defraud or willfulness, which is an essential part of the charges." (R48-4268).

The government claims that the above-quoted portion of the jury instructions was requested by the defendants. Having asked for the charge, the government claims, they cannot now complain about it. *See United States v. Chandler,* 996 F.2d 1073, 1084 (11th Cir.1993) (appellant cannot complain of a jury instruction that he submitted), *cert. denied,* — U.S. —, 114 S.Ct. 2724, 129 L.Ed.2d 848 (1994); *Leverett v. Spears,* 877 F.2d 921, 924 (11th Cir.1989) (doctrine of invited error precludes appellate claim that jury instruction requested by the appellant was erroneous). The Paradies defendants claim that the charge was not accepted as they requested it verbatim, but that they strenuously objected to the amended version given by the district court.

Assuming that the defendants are not barred from complain-ing about the instructions, the court must look at "the charges as a whole" to determine whether the jury was "sufficiently instructed . . . so that it understood the issues involved and were not misled." *See Hooshmand,* 931 F.2d at 731. The portions of the instructions about which the defendants complain might potentially be deemed confusing.[34] However, after reviewing the instructions in their entirety, we find that they were legally sufficient, particularly in light of the other instructions pointed out by the government. The court explained many times that the

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[34] For example, the last part instructs that if the jury *doubts* the defendant's good faith, then it should find that the defendant did not violate his duty. It would seem that the law is the converse (*i.e.*, if you doubt that the defendants acted in good faith, then you should find that they violated the law.).

defendants must have acted with the specific "intent to defraud," which constituted a correct assessment of the law. [35]

(2) Theory of Defense

The refusal to give an instruction is reviewed for an abuse of discretion. *United States v. Turner*, 871 F.2d 1574, 1578 (11th Cir.), *cert. denied*, 493 U.S. 997, 110 S.Ct. 552, 107 L.Ed.2d 548 (1989), and is reversible error if (1) the requested instruction was a correct statement of the law, (2) its subject matter was not substantially covered by other instructions, and (3) its subject matter dealt with an issue in the trial court that was so important that failure to give it seriously impaired the defendant's ability to defend himself. *United States v. Sirang*, 70 F.3d 588, 593 (11th Cir.1995).

Almost three months before trial, D. Paradies submitted a requested jury charge labeled "Theory of the Defense." The submitted charge consisted only of two introductory paragraphs, and then explained in brackets that "the remainder of this proposed charge will be submitted to the Court after the defense rests." At some point just before the court instructed the jury, D. Paradies submitted the remainder of the proposed charge, which basically summed up his defense theory: that he had no duty to supervise the financial arrangements between his co-defendants; that he had no specific intent to defraud because his duty was to pay the dividends and management fees as required by the City of Atlanta's Ordinances on Minority

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[35] The Paradies defendants claim that the evidence was insufficient to convict them of mail fraud because there was no evidence that the Paradies defendants knew of the illegal nature of the relationship between Wilbourn, Hartsfield Concessions, and Jackson. In light of the fact that ignorance of the law is an invalid defense, and because of the overwhelming amount of evidence that showed the defendants' knowledge of and involvement in the fraudulent scheme, we reject that argument. We do not construe *United States v. Sanchez-Corcino*, 85 F.3d 549 (11th Cir.1996), as requiring a different result on the issue of requisite intent.

Participation; and that there was no illegal conspiracy because his agreement with Echols had a legitimate purpose. Now D. Paradies claims that failure to give that charge was reversible error.

The district court disallowed the "revised" version of the proposed instruction because it was untimely and because "it wasn't any good anyhow." D. Paradies argues that his proposed jury charge was, in fact, timely because he filed the first proposed charge long before trial, putting the court and the government on notice. While the timeliness of this proposed jury instruction is highly suspect because the substance of it was not submitted until just before the court delivered the charges, we will assume that the instruction was timely filed and is properly reviewable by this court.[36]

Paradies argues that a defendant is entitled to a theory of defense charge for which there is any evidentiary foundation, "even though the evidence may be weak, insufficient, inconsistent, or of doubtful credibility." *United States v. Opdahl,* 930 F.2d 1530, 1535 (11th Cir.1991) (quoting *United States v. Lively,* 803 F.2d 1124, 1126 (11th Cir.1986)). *See also United States v. Edwards,* 968 F.2d 1148, 1153 (11th Cir.1992) ("[i]t has long been established in this Circuit that it is reversible error

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[36] Fed.R.Crim.P. 30 requires the filing of written responses "[a]t the close of the evidence or at such earlier time during the trial as the court reasonably directs." The Local Rules of the court below directed the parties to file written jury instruction requests "no later than 9:30 a.m. on the date on which the case is calendared. . . ." *See* N.D.Ga. *Local Rules* 255-2 and 525-6. Paradies did not file this instruction in accordance with the local rule, but he claims that "[t]he Local Rules cannot sensibly be read to require the pretrial submission of charges *on issues whose substance is unknown before trial.*" While the defendants claim that they did not know whether their theory of defense would be supported by the evidence, they make no persuasive argument that they did not know of the substance of their defense prior to trial. *See United States v. Johnson,* 713 F.2d 633, 652-53 (11th Cir.1983), *cert. denied,* 465 U.S. 1081, 104 S.Ct. 1447, 79 L.Ed.2d 766 (1984).

to refuse to charge on a defense theory for which there is an evidentiary foundation and which, if believed by the jury, would be legally sufficient to render the accused innocent"), *cert. denied*, 506 U.S. 1064, 113 S.Ct. 1006, 122 L.Ed.2d 155 (1993). In determining whether the record contains any evidentiary foundation to support the charge, the evidence must be viewed in the light most favorable to the defendant. *United States v. Hedges*, 912 F.2d 1397, 1406 (11th Cir.1990); *United States v. Lewis*, 592 F.2d 1282, 1285 (5th Cir.1979). We find that the district court was correct in finding that the requested jury charge was partisan and that it aspired "to place the Paradies defendants' desired factual findings into the mouth of the court." *See United States v. Barham*, 595 F.2d 231, 245 (5th Cir.1979) (affirming district court's failure to give "theory of defense" jury instruction when "the requested instruction was more in the nature of a jury argument than a charge"), *cert. denied*, 450 U.S. 1002, 101 S.Ct. 1711, 68 L.Ed.2d 205 (1981); *see also United States v. Silverman*, 745 F.2d 1386, 1399-1400 (11th Cir.1984) (affirming district court's refusal to give "theory of defense" argument because the instruction merely emphasized a certain phase of the evidence). Also, the proposed instruction included legal theories which we have rejected *supra* (*e.g.*, the "duty" theory, the "ignorance of the law" defense). Indeed, a charge must have "legal support" as well as foundation in the evidence. *United States v. Morris*, 20 F.3d 1111, 1115 (11th Cir.1994) (finding that a defendant is entitled to a theory of defense instruction as long as it has legal support); *Silverman*, 745 F.2d at 1399 ("the requested instruction must be a legally cognizable defense to the indictment"). The instructions given by the district court fairly and adequately presented Paradies' defense theories to the jury. *See Barham*, 595 F.2d at 245 (finding that the instructions given adequately and fairly presented the defendant's theory without the "theory of defense" instruction). Therefore, we find that D. Paradies is not entitled to a reversal based on the district court's failure to give the proposed instruction.

D. Propriety of the Convictions Pursuant to § 666

D. Paradies and Jackson contest their convictions under 18 U.S.C. § 666, which criminalizes the following acts:

> [C]orruptly giv[ing], offer[ing], or agree[ing] to give anything of value to any person, with intent to influence or reward an agent of an organization or of a State, local or Indian tribal government, or any agency thereof, in connection with any business, transaction, or series of transactions of such organiza-tion, government, or agency involving anything of a value of $5000 or more.

18 U.S.C. § 666(a)(2). The statute applies, however, only where:

> the organization, government, or agency receives, in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance.

18 U.S.C. § 666(b). D. Paradies argues that the district court misconstrued § 666 not to require two essential elements: (1) that the corrupt payments be made in connection with the *administration of programs* receiving federal funds, and (2) that the payments be made as a "quid pro quo" for an official act. He argues that those errors led the district court impermissibly to deny his motions to dismiss, for judgment of acquittal, and for a new trial, and that they also caused the court to reject the proposed jury charges relating to those issues. Jackson relies only on the first argument, and not the "quid pro quo" argument, in support of his claim. The government, on the other hand, claims that "[t]he plain language of § 666 does not impose these limitations, nor has any court ever engrafted these limitations on the clear statutory text." We will discuss each argument in turn.

(1) Does § 666 Require that the Corrupt Payment Be Directly Connected to the Administration of Federal Funds?

The defendants argue that they cannot be convicted pursuant to § 666 because the corrupt payments that were the subject of those convictions were not shown to be connected to any federally funded program. They argue, relying on legislative history, that the purpose of the statute was to protect the integrity of monies distributed through federal programs. Because the corrupt transactions at issue affected only private or local monies, their conduct was not intended to be covered under § 666. In addition to legislative history, the defendants cite authority from other jurisdictions that purport to apply this restriction to crimes under § 666. *See United States v. Wyncoop,* 11 F.3d 119 (9th Cir.1993); *United States v. Coyne,* 4 F.3d 100 (2d Cir.1993), *cert. denied,* 510 U.S. 1095, 114 S.Ct. 929, 127 L.Ed.2d 221 (1994); *United States v. Cicco,* 938 F.2d 441 (3d Cir.1991); and *United States v. Westmoreland,* 841 F.2d 572 (5th Cir.), *cert. denied,* 488 U.S. 820, 109 S.Ct. 62, 102 L.Ed.2d 39 (1988). The government claims, however, that "[e]very court to have considered this issue has rejected defendant's argument attempting to limit the scope of the statute." Further, it argues that *Westmoreland* actually supports its position. We agree.

First, in construing § 666, we agree with the following expression of the Fifth Circuit:

> [W]e find the relevant statutory language plain and unambiguous. By the terms of § 666, *when a local government agency receives an annual benefit of more than $10,000 under a federal assistance program, its agents are governed by the statute*, and an agent violates subsection (b) when he engages in the prohibited conduct "in any transaction or matter or series of transactions or matters involving $5,000 or more concerning the affairs of" the local government agency. 18 U.S.C. § 666(b) (Supp.1984) (emphasis added). Subsection (b) contains nothing to indicate that "any transaction involving $5,000" means "any federally funded transaction involving

> $5,000" or "any transaction involving $5,000 of federal funds," and other subsections of the statute contain no inconsistent provisions that might suggest such a qualification.

Westmoreland, 841 F.2d at 576 (emphasis added).

Other circuits have followed this approach and have established that the government is not required under § 666 to trace the flow of federal funds and assistance to any particular project, such as the airport concession programs. *See United States v. Bonito*, 57 F.3d 167, 172-73 (2d Cir.1995) (rejecting argument that there must be a link between the corrupt transaction and the protection of federal funds), *cert. denied*, — U.S. —, 116 S.Ct. 713, 133 L.Ed.2d 667 (1996); *Coyne*, 4 F.3d at 108-09 (stating that the plain language of § 666 "neither explicitly nor implicitly requires that the $10,000 be directly linked to the program that was the subject of the bribe"); *United States v. Simas*, 937 F.2d 459 (9th Cir.1991) ("The broad language of [§ 666] does not require a tracing of federal funds to the project affected by the bribe."). Furthermore, the plain language of the statute merely requires that the payments be made to an agent of the State which "receives benefits in excess of $10,000 in any one year period." Because the language in the statute is clear, it would be improper to look to the legislative history for clarification. *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 254, 112 S.Ct. 1146, 1149-50, 117 L.Ed.2d 391 (1992). We find the cases cited by defendants to be distinguishable or inapplicable.[37] Accordingly, we decline the invitation to include the suggested "connection to federal funds" element as a requirement to convictions under § 666.

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[37] *United States v. Cicco*, 938 F.2d 441, 444 (3d Cir.1991) (finding that the test of § 666 is ambiguous); *United States v. Wyncoop*, 11 F.3d 119, 121-23 (9th Cir.1993) (discussing whether § 666 applies to employees of entities that receive only indirect benefits from a federal program).

(2) Does § 666 Require a Quid Pro Quo?

A quid pro quo is simply a specific official act in exchange for a specific corrupt payment. D. Paradies claims that this element is required in order to convict him under § 666, as is evidenced by the amendment of § 666, and that the district court erred in failing to give an appropriate jury charge to that effect. Further, he argues that the government did not produce evidence that the 1990 reimbursement to Echols was connected in any way to an official act or benefit.

The government claims that, because this is the appeal from the district court's failure to give a "quid pro quo" jury charge, and the defendant neither requested nor objected to the absence thereof, this court reviews this issue for plain error. Fed.R.Crim.P. 52(b). Specifically, the government argues that, even in jurisdictions that require a quid pro quo, jury instructions that merely track the language of the statute is not error. The court in *United States v. Medley*, 913 F.2d 1248, 1260 (7th Cir.1990), *cert. denied*, 510 U.S. 1013, 114 S.Ct. 604, 126 L.Ed.2d 569 (1993), stated that "[t]he essential element of a § 666 violation is a 'quid pro quo[.]' " The court opined, however, that the defendant did not object to the jury instructions given in the district court, which instructions "set forth the offense using the language in the body of § 666." *Id.* at 1259. In light of that fact, the instructions did not constitute error.

We have carefully reviewed the jury charges given in this case, and we are persuaded that the district court did not commit reversible error under the reasoning in *Medley*. The jury charges tracked the statutory requirements, and the evidence at trial was sufficient for a jury to find that Jackson accepted payments for his votes and his influence upon the City Council and the administration. Such a finding would satisfy any quid pro quo requirement under the statute. Therefore, the court's instructions were not plainly erroneous, and they would not serve as a basis for reversal under these circumstances.

E. Evidentiary Issues

The Paradies defendants also raise numerous evidentiary issues.[38] Particularly, they claim that the district court abused its discretion in excluding certain testimony of their legal expert, in admitting a tape recording of a payoff to Echols, and in admitting evidence against D. Paradies under Rule 404(b). We have carefully considered those arguments and, as is explained below, we find that the district court did not abuse its discretion in any respect.

(1) Limitation of Testimony of Legal Expert

The district court's exclusion of expert testimony is subject to an abuse of discretion standard, *United States v. Lankford*, 955 F.2d 1545, 1550 (11th Cir.1992), and constitutes reversible error if the defendant establishes that the error had a "substantial impact on the outcome." *United States v. Sellers*, 906 F.2d 597, 601 (11th Cir.1990).

The Paradies defendants called Thomas O. Marshall, a former Chief Justice of the Georgia Supreme Court, to testify as a legal expert. He testified about the City's MBE program and the management and shareholder's agreements. The district court refused to allow Judge Marshall to testify about the enactment of

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[38] Generally, all of the defendants argue that the government's trial evidence was insufficient to convict them on various counts. In reviewing that claim, we have examined the evidence in the light most favorable to the government to determine whether "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979); *see United States v. Dynalectric Co.*, 859 F.2d 1559, 1574 (11th Cir.1988). Using that standard, we have evaluated this evidence *de novo* in order to determine whether the district court erred in denying the defendants' motions for acquittal. *See United States v. Busacca*, 936 F.2d 232, 239 (6th Cir.), *cert. denied*, 502 U.S. 985, 112 S.Ct. 595, 116 L.Ed.2d 619 (1991). After a thorough review of the record in this case, we reject all of the defendants' "sufficiency of the evidence" contentions.

§ 1346 and how it changed the law. The Paradies defendants objected, claiming that this witness would support their defenses of ignorance of the law and lack of fair notice as an element of the vagueness defense. He would have testified that a reasonable man would not have been put on notice that § 1346 precluded the Paradies defendants from making the payments to Jackson, even if Paradies knew that the arrangement between Wilbourn and Jackson was illegitimate. *United States v. Garber*, 607 F.2d 92 (5th Cir.1979) (reversing conviction because trial court did not allow expert legal testimony on tax laws).

While *Garber* may be the law for tax cases, ignorance of the law is not a defense in this mail fraud case, as we have already discussed *supra*. *See Hollis*, 971 F.2d at 1451-52. Testimony that ignorance of the law was a defense would have mislead and confused the jury. "The law would be in a curious state if jurors received their instructions on the law from an expert witness as well from the trial judge." *United States v. Brodie*, 858 F.2d 492, 497 (9th Cir.1988) (rejecting proffer of an expert to testify on unsettled points of law). Additionally, as we have concluded, § 1346 is not vague under these circumstances as a matter of law, and testimony regarding that issue was properly excluded. The district court, indeed, gave witness Marshall a broad scope of opinion testimony over objections of the government. Accordingly, it was not an abuse of discretion for the district court to limit that testimony.

(2) Admission of Tape Recorded Payoffs

After he began to cooperate with the government, Echols agreed to be videotaped and audiotaped at breakfast/bribery meetings held between Echols and two other councilmembers, Arrington and Fowlkes. The tapes show the councilmembers accepting bribes, and they also contain statements by Mr. Echols about Paradies' decision not to testify before the grand jury. Govt. Exhibit 473T ("They wanted to talk to Paradies, and at that time Paradies' attorney wouldn't let Paradies go down."). Paradies filed a motion in limine to exclude the tapes because they constituted hearsay, and they were irrelevant and prejudicial. The

district court disallowed the tapes in the governments case-in-chief because they were irrelevant and unduly prejudicial. He reserved final determination on the matter, however, because the only basis for admission of the tapes would have been to rehabilitate Echols' credibility.

After Echols testified on direct at trial, the defense conducted an aggressive cross-examination of Echols. On redirect, to rehabilitate their witness, the government again sought to introduce the tapes. The district court found that the tapes were admissible under Fed.R.Evid. 801(d)(1)(B), which states that a statement is not hearsay if it is a prior consistent statement of a witness that is used to rebut an implied charge of recent fabrication.[39] On appeal, the parties agree that the admission of the tapes under this rule was error, because the Supreme Court has recently decided that the prior consistent statement under the rule must have been made *before* the alleged influence or motivation to fabricate arose. *Tome v. United States*, — U.S. —, 115 S.Ct. 696, 130 L.Ed.2d 574 (1995). In this case, the government made the tapes after Echols' agreement to cooperate with the government.[40] Therefore, under *Tome*, the tapes would not constitute nonhearsay under 801(d)(1)(B), and the district court erred in so finding.

The government correctly argues, however, that "[r]egardless of the ground for admission of evidence cited by the district court, this Court will uphold the admission even if the district court's reasons were erroneous if the admission was proper on other grounds." *United States v. Cardenas*, 895 F.2d 1338, 1345 (11th Cir.1990). The government also correctly points out that the tapes were not hearsay, because they were not statements offered for the truth of the matter asserted. Rather, the breakfast conversations were innocuous, and they were offered merely to

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[39] This rule is not a hearsay exception—it is a rule defining a statement that is not hearsay.

[40] His agreement with the government is presumably the basis for his motivation to fabricate his testimony.

rehabilitate Echols' testimony that the people involved had a familiar relationship and had regular breakfast meetings.[41] *See United States v. Price,* 792 F.2d 994, 996-97 (11th Cir.1986) (statements admitted simply to put other statements into context are not hearsay). Also, there are no nonverbal hearsay concerns with the videotape of money being passed, because "[w]hen non-verbal conduct, like the transfer of money, is ambiguous, contemporaneous words which characterize the transactions are not hearsay." *United States v. Valentine,* 644 F.Supp. 818, 821 (S.D.N.Y. 1986). Therefore, because the video and audio tapes became relevant to rehabilitate Echols, and because the tapes did not constitute hearsay, the admission of the evidence was proper despite the court's erroneous ruling.

(3) Admission of Evidence Pursuant to 404(b)

"This court reviews the decision to admit extrinsic act evidence under Fed.R.Evid. 404(b)[42] for 'clear abuse of discretion.'" *United States v. Hooshmand,* 931 F.2d 725, 736 (11th Cir.1991). The government must show that "(1) the evidence is relevant to an issue other than the defendant's character and (2) the probative value outweighs any prejudicial effect." *Id.* Also, the "evidence is admissible only if the jury could reasonably find by a

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[41] The innocuous nature of the conversations was one reason the district court initially disallowed the evidence as irrelevant. For example, although Echols made a statement about the government wanting to talk to Paradies, the government was not attempting to show that "the government wanted to talk to Paradies." They wanted to show that Echols was not lying when he testified to having a familiar relationship with the councilman and had regular breakfast meetings with him.

[42] Fed.R.Evid. 404(b) provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. . . ."

preponderance of the evidence that the defendant committed the extrinsic act." *Id.*

The district court admitted two days and seven witnesses regarding evidence that the Paradies defendants violated the Michigan Campaign Finance Act ("MCFA") from 1990 through 1993 by illegally reimbursing employees for contributions to political candidates and concealing those reimbursements through phony travel vouchers. D. Paradies claims that the jury could not reasonably find that he was involved in the extrinsic acts. He takes issue with the illicit intent attached to the evidence, because he claims that there was no evidence that the actions of his companies violated any laws. He claims that there is no basis for 404(b) evidence when the extrinsic act involved legal activity. *Id.* The government contends that the evidence was sufficient to find that Mr. Paradies was involved in his companies' illegal contributions that violated the MCFA. We agree with the government on this point, in light of the overwhelming evidence regarding the high degree of control D. Paradies had over his companies and the intricacy of the reimbursement plan. Specifically, the evidence showed that on two travel vouchers, the annotation "Per Dan" was included next to a dinner expense for which there was no dinner. Also, the evidence showed that Mr. Paradies was active in attempting to influence, or "lobby," decisionmakers for the benefit of his companies. The jury could infer from this evidence that Mr. Paradies was involved in the clandestine scheme to contribute to political campaigns and influence those in political office who could control his airport operations.

F. Jackson's Sentence Pursuant to the Sentencing Guidelines

Defendant Jackson raises several objections to the applications of the sentencing guidelines to his sentence. Review of the district court's determination that Jackson's sentence should have been enhanced under U.S.S.G. §§ F1.1, 3C1.1, and 2T1.1 is subject to a clearly erroneous standard of review. *See United States v. Cannon*, 41 F.3d 1462, 1467 (11th Cir.) (s 2F1.1), *cert. denied*, — U.S. —, 116 S.Ct. 86, 133 L.Ed.2d 44 (1995); *United*

States v. Jones, 32 F.3d 1512, 1519 (11th Cir.1994) (§ 3C1.1). The district court's determination that the specific offense characteristic in U.S.S.G. § 2C1.1(b)(2)(B) applies to the recipient of a pa[illegible]ment is a question of law subject to *de novo* review.

Jackson fir[illegible]aims that the district court erroneously calculated the [illegible]ount of loss under U.S.S.G. § 2F1.1. The district court used $669,653.03 as the amount of "loss" involved in the fraud. Jackson claims that this amount should be reduced by $400,000, which constitutes the "loan amounts." Curiously, Jackson does not provide any factual or legal basis on which this reduction should be made. We do not think that the loss amount, which consisted of the money that Jackson received from the scheme after November 18, 1988, should be reduced by any "loan amount," because the loans involved in this case were proven to be illegitimate. Therefore, Jackson's argument is meritless.

Next, Jackson argues that the district court erred in enhancing his sentence under § 3C1.1 for committing perjury at his trial. That section provides that "[i]f the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the investigation, prosecution or sentencing of the instant offense, increase the offense level by two levels." U.S.S.G. § 3C1.1. The district court made a factual finding that Jackson committed perjury during the trial in a number of instances, particularly when he denied having breakfast meetings with Harold Echols. On that basis, the district court enhanced his sentence for obstruction of justice. Defendant Jackson has failed to establish that the district court was clearly erroneous in its determination that he testified untruthfully at trial. *See Jones*, 32 F.3d at 1519 (noting that the comments to § 3C1.1 allow the enhancement if the defendant commits perjury or provides materially false information to a judge). While Jackson claims that the district court erred because it penalized him merely for his failure to plead guilty, that was not the case. Therefore, Jackson's "obstruction of justice" challenge must fail.

The district court further found that Jackson used "sophisticated means" to impede discovery of the existence or extent of the tax offense. *See* U.S.S.G. § 2T1.1(b)(2) (allowing two-level increase if sophisticated means were used to impede discovery of a tax offense). Jackson claims that the district court erred in enhancing his sentence under this section because he claims that the evidence presented in the case did not support a finding that "sophisticated means" were used. The government argues, however, that it presented ample evidence that Jackson routinely transferred money through shell corporations, such as Options International, Inc., in an attempt to conceal his transactions. In light of the evidence presented at trial, we agree with the government and find that the district court did not clearly err in enhancing Jackson's level based on the use of "sophisticated means."

Finally, Jackson's offense level was increased under U.S.S.G. § 2C1.1, which provides that "[i]f the offense level involved more than one bribe or extortion, increase by two levels. . . . If the offense involved a payment for the purpose of influencing an elected official or any official holding a high level decision-making or sensitive position, increase by eight levels." U.S.S.G. § 2C1.1(b)(1) & (2)(B). Jackson claims that his sentence should not have been enhanced under this section because he was the payee, not the payor, of the bribes. The background to that section of the guidelines directly refutes Jackson's contention, because it states that "the guideline applies to a public official who solicits *or accepts* such a bribe." In light of this background statement and in the absence of any case law to the contrary, Jackson's contention must be rejected.

III. CONCLUSION

In sum, we conclude that the district court did not commit reversible error in connection with any of the convictions or sentences of these defendants. We repeat the irony in this case that the thirty-five percent minority participation requirement

imposed by Dobbs,[43] which was designed to benefit minority-owned businesses served as the underlying vehicle by which Jackson became involved with the Paradies defendants. In any event, these parties received a fair trial, and the jury returned a reasonable verdict. Accordingly, we hereby AFFIRM the district court in all respects.

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[43] The City required only 20% minority participation.

[Filed Dec. 26, 1996]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 94-8485

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

DANIEL M. PARADIES,
THE PARADIES SHOPS, INC.,
PARADIES SHOPS, INC.,
PARADIES MIDFIELD CORPORATION.
IRA JACKSON,
Defendants-Appellants.

On Appeal from the United States District Court for the Northern District of Georgia

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ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

(Opinion _____, 11th Cir., 19__, ___ F.2d ____).

Before: TJOFLAT and COX, Circuit Judges, and WELLFORD,* Senior Circuit Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court

* Honorable Harry W. Wellford, Senior U.S. Circuit Judge for the Sixth Circuit Court of Appeals, sitting by designation.

having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/Gerald Tjoflat

UNITED STATES CIRCUIT JUDGE

[Filed Jan. 22, 1997]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 94-8485

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

DANIEL M. PARADIES,
THE PARADIES SHOPS, INC.,
PARADIES SHOPS, INC.,
PARADIES MIDFIELD CORPORATION.
IRA JACKSON,
Defendants-Appellants.

On Appeal from the United States District Court for the Northern District of Georgia

O R D E R:

Appellant, Daniel M. Paradies', motion to stay mandate pending petition for writ of certiorari is granted.

Appellant, Ira Jackson's, motion to stay mandate pending petition for writ of certiorari is granted.

Appellants, The Paradies Shops, Inc. and Paradies Midfield Corporation, motion to stay mandate pending petition for writ of certiorari is granted.

/s/Gerald Bard Tjoflat

UNITED STATES CIRCUIT JUDGE

RELEVANT STATUTORY PROVISIONS

18 U.S.C. § 1341. Frauds and swindles

Whoever, having devised or intending to device any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

18 U.S.C. § 1346. Definition of "scheme or artifice to defraud"

For the purposes of this chapter, the term "scheme or artifice to defraud" includes a scheme or artifice to deprive another of the intangible right of honest services.

Supreme Court, U.S.
FILED
APR 24 1997

(2)

No. 96-1346

In the Supreme Court of the United States

OCTOBER TERM, 1996

DANIEL M. PARADIES, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether 18 U.S.C. 1346, which defines a "scheme to defraud" to include a scheme to deprive another of the intangible right to honest services, makes the mail fraud statute applicable to schemes to defraud citizens of the right to public officials' honest services.

2. Whether taped evidence of a witness's payoffs to public officials, including statements of the witness on the tapes, was inadmissible hearsay.

3. Whether 18 U.S.C. 666, which prohibits corrupt payments to officials of state and local agencies that receive federal funds, requires proof that the payments affected the disbursement or integrity of the federal funds.

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In the Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-1346

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-48a) is reported at 98 F.3d 1266.

JURISDICTION

The judgment of the court of appeals was entered on September 23, 1996. A petition for rehearing was denied on December 26, 1996. Pet. App. 49a-50a. The petition for a writ of certiorari was filed on February 21, 1997. A motion to amend the petition for a writ of certiorari and to add a question presented was filed on February 28, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Georgia, petitioners were convicted on 83 counts of mail fraud, in violation of 18 U.S.C. 1341. In addition, petitioner Daniel Paradies was convicted on one count of conspiracy to violate 18 U.S.C. 666 through the making of corrupt payments to public officials, in violation of 18 U.S.C. 371.[1] Petitioner Daniel Paradies was sentenced to 33 months' imprisonment and fined $7,500. Petitioner Paradies Shops, Inc., was sentenced to five years' probation and fined $1,500,000. Petitioner Paradies Midfield was sentenced to five years' probation. The court of appeals affirmed. Pet. App. 1a-48a.

1. Daniel Paradies was president and principal shareholder of The Paradies Shops, Inc., a major gift shop chain at airports across the country. He was also president of Paradies Midfield Corporation, a company that contracted to operate the gift shop at the Atlanta Hartsfield International Airport, which is owned and operated by the City of Atlanta. Ira Jackson was a member of the City Council of Atlanta who owned a hidden interest in Paradies Midfield Corporation. Petitioners' convictions arose from their involvement in two fraudulent schemes concerning the operation of various concessions at the Atlanta airport. Pet. App. 3a, 7a-10a.

In the first scheme, petitioners and Jackson conspired to profit from Jackson's influence as an Atlanta City Councilmember and as the Commissioner of

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[1] Co-defendant Ira Jackson was convicted of mail fraud, receiving corrupt payments (18 U.S.C. 666), and subscribing to false income tax returns (26 U.S.C. 7206(1)). Co-defendant Mack Wilbourn was acquitted of all counts against him.

Aviation. Petitioners assisted Jackson in purchasing an ownership interest in Paradies Midfield Corporation, and in concealing Jackson's ownership interest from the City. Thereafter, petitioners paid Jackson more than $1 million, disguised as fees and dividends, in return for Jackson's use of his political position to reduce the rent of the concessionaires at the Atlanta airport. Pet. App. 1a-12a.

In the second scheme, Daniel Paradies and Harold Echols, another airport concessionaire, regularly gave cash to Jackson and other City Councilmembers for favorable votes in matters before the Council in which petitioners and other concession operators had an interest. Pet. App. 4a, 12a-13a. After Echols began cooperating with the government, the government videotaped and audiotaped breakfast meetings held between Echols and two other City Councilmembers, Marvin Arrington and Buddy Fowlkes. The tapes showed the Councilmembers accepting bribes. They also contained statements by Echols to the Councilmembers that Daniel Paradies had decided not to testify before the grand jury. *Id.* at 42a; Gov't C.A. Br. 125.

2. Before trial, Paradies filed a motion in limine to exclude the tapes of Echols' breakfast meetings on the ground that they were hearsay and were irrelevant and prejudicial. The district court disallowed the tapes in the government's case-in-chief, but reserved final determination on the matter because, it reasoned, the tapes might be admissible to rehabilitate Echols' credibility. Pet. App. 42a-43a.

At trial, Echols testified that he and Paradies entered into an agreement whereby Echols would pay off certain City Councilmembers, including Arrington and Fowlkes, to ensure that they exercised their

authority to favor the airport concessionaires. Under the agreement, Paradies would reimburse Echols for a portion of those payments. Gov't C.A. Br. 124. Echols testified that he had regular, weekly breakfast meetings with Fowlkes and less frequent breakfast meetings with Arrington, at the close of which meetings Echols paid bribes to Fowlkes and Arrington by slipping money into their coat pockets. Gov't C.A. Br. 124-125.

During cross-examination of Echols, defense counsel attempted to discredit Echols's direct testimony. Pet. App. 43a; Gov't C.A. Br. 125. On redirect testimony, the government again sought to introduce the tapes. The district court admitted the tapes under Federal Rule of Evidence 801(d)(1)(B), permitting admission of certain prior consistent statements of a witness, to corroborate Echols' testimony: "The reason I admitted this testimony was to sustain him, if it does, with respect to the thorough and sifting cross-examination seeking to completely impeach everything this witness said, and that is why I let it in. * * * That was almost by invitation on the part of Mr. Paradies' counsel." Pet. App. 43a; Tr. 2232; Gov't C.A. Br. 125.

3. The court of appeals affirmed petitioners' convictions. Pet. App. 1a-48a. The court rejected petitioners' contention that the application of the mail fraud statute, 18 U.S.C. 1341, in a prosecution that invokes the definition of a "scheme to defraud" in 18 U.S.C. 1346 to include "a scheme or artifice to deprive another of the intangible right to honest services," is unconstitutionally vague (Pet. App. 26a-29a), or required a showing in this case that petitioners had a duty to the victims independent of the mail fraud statute itself (*id.* at 24a-26a). The court observed in a

footnote that, after this Court held in *McNally* v. *United States*, 483 U.S. 350 (1987), that the mail fraud statute did not prohibit schemes to deprive the public of the honest services of public officials, Congress enacted Section 1346 to "reinstate the *pre-McNally* rule that such schemes are prohibited by the mail fraud statute." Pet. App. 27a-28a n.30.

The court also rejected petitioner Paradies' claim that, because the payoffs to the Atlanta City Councilmembers did not affect federal funds, those bribes were not covered under 18 U.S.C. 666, and therefore he could not have been guilty of conspiring to violate that provision. Pet. App. 37a-39a. The court held that, although Section 666 applies only to payments made to officials of agencies receiving federal funds, the government is not required under Section 666 to trace the flow of federal funds and assistance to any particular project; it is sufficient that the government show that the agency received the minimum amount of federal assistance specified in the statute. Pet. App. 39a.

The court also rejected petitioners' claim that the district court improperly admitted the tapes of Echols' breakfast meetings with Councilmembers Arrington and Fowlkes. The court concluded that, under this Court's intervening decision in *Tome* v. *United States*, 513 U.S. 150 (1995), the tapes were not admissible under Rule 801(d)(1)(B) as substantive evidence because they were made after Echols agreed to cooperate with the government, and therefore were made after Echols' motive to fabricate arose. Nonetheless, the court upheld the admission of the tapes on the basis that Echols' statements on the tapes were not admitted for the truth of the matters asserted in those statements, and therefore were not hearsay at

all. Pet. App. 43a. The court noted that the breakfast conversations "were innocuous, and they were offered merely to rehabilitate Echols' testimony that the people involved had a familiar relationship and had regular breakfast meetings." *Id.* at 43a-44a. The court also found that there were no nonverbal hearsay concerns with the videotape because "[w]hen nonverbal conduct, like the transfer of money, is ambiguous, contemporaneous words which characterize the transactions are not hearsay." *Id.* at 44a.

DISCUSSION

1. Petitioners contend (Pet. 6-15) that, notwithstanding the enactment of 18 U.S.C. 1346, the mail fraud statute, 18 U.S.C. 1341, does not cover schemes to deprive citizens of honest services by public officials. The court of appeals correctly held to the contrary.

The mail fraud statute, 18 U.S.C. 1341, proscribes mailings in furtherance of "any scheme or artifice to defraud." Before 1987, every court of appeals that had addressed the issue had held that the mail and wire fraud statutes reached public corruption schemes intended to deprive citizens of their intangible right to honest services by public officials, even in the absence of a direct financial effect on a governmental entity. See Pet. App. 27a n.30. In *McNally* v. *United States*, 483 U.S. 350 (1987), this Court held that the mail fraud statute was "limited in scope to the protection of property rights," and it reversed the mail fraud convictions in that case, which had been premised on the theory that the defendants, as public officials, had engaged in a scheme to deprive the citizens of Kentucky of their intangible right to honest government. See *id.* at 360. The Court

explained that "there was no charge and the jury was not required to find that the Commonwealth itself was defrauded of any money or property." *Ibid.* See also *Carpenter* v. *United States*, 484 U.S. 19, 25 (1987) ("We held in *McNally* that the mail fraud statute does not reach 'schemes to defraud citizens of their intangible rights to honest and impartial government,' and that the statute is 'limited in scope to the protection of property rights.' ") (internal citation omitted).

The following year, in response to *McNally*, Congress enacted 18 U.S.C. 1346, which amended the federal fraud statutes (including the mail fraud statute) to provide that a " 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, Tit. VII, § 7603, 102 Stat. 4508. The legislative history makes clear that, in enacting Section 1346, Congress intended to overturn the result in *McNally* and expand the coverage of the mail and wire fraud statutes to reach schemes seeking to deprive citizens of their intangible right to honest services by public officials. As Representative Conyers explained immediately before its passage:

> The Subcommittee on Criminal Justice, which I chair, held a hearing on the McNally decision on May 12, 1988. At that hearing, John C. Keeney, Acting Assistant Attorney General for the Criminal Division, U.S. Department of Justice, testified that as a result of the McNally decision and many significant prosecutions of political corruption brought under the mail and wire fraud statutes have been dismissed or overturned on appeal.
> * * *

Prior to the McNally decision, every Federal appellate court that had considered the scope of the mail and wire fraud provisions held that those provisions protect the right of the public to the honest services of public officials and others responsible for the conduct of public or public affairs [sic]; the right of a member of an organization to the honest services of the leaders of that organization; and the right of employers to the honest service of their employees.

This amendment restores the mail fraud provision to where that provision was before the McNally decision. The amendment also applies to the wire fraud provision, and precludes the McNally result with regard to that provision.

The amendment adds a new section * * * that defines the term "scheme or artifice to defraud" to include a scheme or artifice to defraud another of "the intangible right of honest services." Thus, it is no longer necessary to determine whether or not the scheme or artifice to defraud involved money or property. This amendment is intended merely to overturn the McNally decision. No other change in the law is intended.

Some questions were raised during the Criminal Justice Subcommittee's hearing on the McNally decision regarding the Federal Government's constitutional role in prosecuting State and local corruption. I believe that the guarantee clause of the U.S. Constitution, article IV, section 4 can be used as a constitutional basis for Congress to pass criminal legislation relating to corruption in local government.

134 Cong. Rec. 33,296-33,297 (1988) (citations omitted). That passage makes clear that Congress intended Section 1346 to reach schemes to deprive citizens of their right to the honest services of public officials.[2]

Petitioners nonetheless argue (Pet. 12-15) that, because Section 1346 makes no express reference to state or local government or to state or local officials, the statute failed to expand the coverage of the mail fraud state to schemes to deprive citizens of their intangible rights of honest services, and thus failed to overturn the legal rule adopted by this Court in *McNally*. Nothing in the background or the legislative history of Section 1346, however, reflects any congressional desire to distinguish between the public's right of honest services from public officials and a private person's right to honest services from persons acting in a private capacity. To the contrary, given Congress's clear intent to overturn the result in *McNally* itself, which involved a public official's scheme to defraud the citizenry of its right to honest services, the conclusion is inescapable that Congress

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[2] A month after passage of Section 1346, a Senate Judiciary Committee Report similarly described the purpose of Section 1346 as follows:

> This section overturns the decision in *McNally* v. *United States* in which the Supreme Court held that the mail and wire fraud statutes protect property but not intangible rights. Under the amendment, those statutes will protect any person's intangible right to the honest services of another, including the right of the public to the honest services of public officials. The intent is to reinstate all of the pre-*McNally* caselaw pertaining to the mail and wire fraud statutes without change.

134 Cong. Rec. S17,376 (daily ed. Nov. 10, 1988).

intended Section 1346 to reach schemes by public officials to deprive the public of honest services.

Petitioners note (Pet. 11-12 & n.5) that other bills before Congress around the same time that Section 1346 was passed expressly prohibited public corruption. That alternative bills to Section 1346 contained express language proscribing public corruption does not establish that the legislation ultimately passed did not reach such conduct. See *United States* v. *Frega*, 933 F. Supp. 1536, 1545 (S.D. Cal. 1996) (alternative bills are "unpersuasive evidence on the issue of whether Congress intended to extend mail fraud to public officials"; it is equally plausible that Congress did not pass the alternative bills because Section 1346 encompassed them and made them unnecessary). Congress may also have found the alternative proposed legislation too narrow in that it may have reached only corruption involving public officials, and not schemes to deprive private employers or organizations of their right to honest services by their officials and agents. Cf., *e.g.*, 134 Cong. Rec. 31,071-31,073 (1988) (text of alternative legislation, dealing with public corruption).

The courts of appeals that have definitively addressed the issue thus far have all concluded that Section 1346 reaches public corruption schemes. *United States* v. *Grandmaison*, 77 F.3d 555, 566 (1st Cir. 1996); *United States* v. *Catalfo*, 64 F.3d 1070, 1077 n.5 (7th Cir. 1995), cert. denied, 116 S. Ct. 1683 (1996); *United States* v. *Bryan*, 58 F.3d 933, 940 n.1 (4th Cir. 1995); *United States* v. *Waymer*, 55 F.3d 564, 568 n.3 (11th Cir. 1995), cert. denied, 116 S. Ct. 1350 (1996); *United States* v. *DeFries*, 43 F.3d 707, 709 n.1 (D.C. Cir. 1995); *United States* v. *Thomas*, 32 F.3d 418, 419 (9th Cir. 1994); *United States* v. *Holley*, 23 F.3d 902,

910 (5th Cir.), cert. denied, 513 U.S. 1043 (1994); *United States* v. *Dischner*, 974 F.2d 1502, 1518 n.16 (9th Cir. 1992), cert. denied, 507 U.S. 923 (1993); *United States* v. *Ames Sintering Co.*, 927 F.2d 232, 235 (6th Cir. 1990); *United States* v. *Alkens*, 925 F.2d 541, 548 (2d Cir. 1991); *United States* v. *Granberry*, 908 F.2d 278, 281 n.1 (8th Cir. 1990), cert. denied, 500 U.S. 921 (1991); *United States* v. *Martinez*, 905 F.2d 709, 715 (3d Cir.), cert. denied, 498 U.S. 1017 (1990). See also *West Virginia Univ. Hosp., Inc.* v. *Casey*, 499 U.S. 83, 114 (1991) (Stevens, J., dissenting) ("[The Court's] refusal to accept the widely held view by lower courts about the scope of fraud, see *McNally* * * *, was quickly corrected by the 100th Congress" through enactment of Section 1346). In *United States* v. *Brumley*, 79 F.3d 1430 (1996), a panel of the Fifth Circuit held that Section 1346 does not reach a scheme by public officials to deprive citizens of their right to honest services. That court, however, has granted the government's petition to rehear the *Brumley* case en banc. 91 F.3d 676 (1996). Accordingly, there is no pending conflict among the circuits on the application of Section 1346 to public officials.

2. Petitioners also contend (Pet. 17-26) that the court of appeals improperly upheld the admission of tapes of Echols' breakfast meetings with Arrington and Fowlkes. According to petitioners, Echols' prior consistent statements, recorded in the tapes, were inadmissible, either as substantive evidence pursuant to Federal Rule of Evidence 801(d)(1)(B) or for purposes of rehabilitation, because the statements were made after Echols had acquired a motive to fabricate. That argument misconstrues the basis for the court of appeals' decision upholding the admission of the tapes.

The district court admitted the videotapes of the meetings pursuant to Rule 801(d)(1)(B), which provides that a prior out-of-court statement consistent with a witness's trial testimony is not hearsay and is admissible for the truth of the matter asserted if the declarant testifies and is subject to cross-examination concerning the statement at trial, and if the prior statement is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive.[3] The admission of the tapes under that theory was in accordance with prevailing law in the circuit at the time of trial. See *United States* v. *Farmer*, 923 F.2d 1557, 1568 (11th Cir. 1991). Following trial, however, this Court held in *Tome* v. *United States*, 513 U.S. 150 (1995), that Rule 801(d)(1)(B) "permits the introduction of a declarant's consistent out-of-court statements to rebut a charge of recent fabrication or improper influence or motive only when those statements were made before the charged recent fabrication or improper influence or motive." 513 U.S. at 167. Here, because Echols' prior statements were made after he began cooperating with the government, and thus after he acquired a motive to fabricate, the tapes were not admissible as substantive evidence pursuant to Rule 801(d)(1)(B).

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[3] Rule 801(d)(1)(B) provides that a statement is not hearsay if

> [t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is * * * consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive.

The court of appeals did not uphold the admission of the tapes under Rule 801(d)(1)(B). Rather, the court of appeals upheld the admission of the tapes on the ground that they did not constitute hearsay at all because the statements on the tape were not offered for the truth of the matters asserted in the statements.[4] See Fed. R. Evid. 801(c) ("'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."). As the court of appeals observed, the tapes of the breakfast conversations were offered, not for the truth of the matters stated by Echols in his conversations recorded on those videotapes, but to demonstrate the familiar relationship between Echols and Councilmembers Arrington and Fowlkes and to provide a contextual backdrop for the nonverbal acts (Echols' payment of money to those Councilmembers) that were captured on videotape. The recorded conversations also demonstrated the ease with which the money changed hands, thus serving to corroborate Echols' testimony on direct examination that he routinely made such bribes to Fowlkes and Arrington.[5] See *United States* v. *Collicott*, 92 F.3d 973, 981

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[4] That was the ground upon which the government primarily relied in offering the tapes at trial. See Government's Response to The Paradies Defendants' Motion In Limine To Exclude Certain Testimonial, Video and Audio Evidence 7-11.

[5] Petitioners contend (Pet. 4) that, during the meetings, Echols twice stated that Paradies was behind Echols' agreement to pay Arrington $5,000 to secure the appointment of a certain individual to chair the City Council's Transportation Committee. That is a claim made for the first time in this Court. In his brief on appeal, Paradies asserted only that the recorded conversations contained statements by Echols about

n.7 (9th Cir. 1996) ("[I]f [prior consistent statements] become relevant for a purpose other than their truth, such as to clarify and provide context to other statements from the same conversation, then they may be admissible."); *United States* v. *Price*, 792 F.2d 994, 996-997 (11th Cir. 1986) (statements offered simply to

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Paradies' decision not to testify before the grand jury. See Paradies C.A. Br. 30 ("They wanted to talk to Paradies, and at that time Paradies' attorney wouldn't let Paradies go down."). In fact, the recorded conversations introduced by the government during its redirect examination of Echols did not contain the statements now complained of by petitioners. See GXs 473T and 475T (Echols' Feb. 3, 1993, meeting with Arrington, and Echols' Jan. 6, 1993, meeting with Fowlkes).

Following the introduction of the recorded conversations during the government's redirect examination of Echols (see Tr. 2221-2224, 2228, 2240-2245), defense counsel on recross-examination questioned Echols about a February 9, 1993, telephone conversation between Echols and Arrington that had not been introduced into evidence. Tr. 2253-2261. The defense was relying on a transcript of that recording that it had prepared for its own use; the government had not transcribed this conversation. See Tr. 2250-2252. On redirect examination, the district court allowed the government to introduce a tape of the conversation in question in order to place the conversation in context. Tr. 2272, 2275-2276. Because defense counsel did not have a clean copy of the transcript, it was not possible to provide the jury with copies of the transcript. See Tr. 2272, 2276. Even if the recording introduced into evidence contains the alleged incriminating statements, petitioners cannot complain of its admission. Petitioners broached the subject of the conversation during which the alleged statements were made, and therefore opened the door to admission of the tape of that conversation. Moreover, petitioners did not object when the tape was offered into evidence, see Tr. 2270, and did not request that the tape be redacted to excise the alleged incriminating statements. See Gov't C.A. Br. 132 n.22; Tr. 2275-2276.

put other statements into context are not hearsay); *United States* v. *Conn*, 769 F.2d 420, 422 (7th Cir. 1985) (upholding admission of tape recorded conversations as verbal acts to establish background, continuity, and the relationship between two public officials, and to explain subsequent taped conversations); *United States* v. *Valentine*, 644 F. Supp. 818, 821 (S.D.N.Y. 1986) ("When non-verbal conduct, like the transfer of money, is ambiguous, contemporaneous words which characterize the transactions are not hearsay."); see also 6 J. Wigmore, *Evidence* § 1777, at 275-276 (1976) ("Declarations accompanying a *delivery of money* may therefore be admissible, in order to determine whether a loan or a payment was made, whether one debt or another was paid, * * * or whether any other significance is to be attributed to the act.") (footnote omitted).[6] In sum, because the tapes were not hearsay, their admission was proper

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[6] See also *United States* v. *Romano*, 684 F.2d 1057, 1066 (2d Cir.) (in trial for extracting illegal labor payments as protection money, testimony by fish wholesalers that they were told the money would be used as "Christmas payments" for "the boys in the union" was admissible as utterances "contemporaneous with an independently admissible nonverbal act . . . and which relates to that act and throws some light upon it"), cert. denied, 459 U.S. 1016 (1982); *United States* v. *Jackson*, 588 F.2d 1046, 1050 n.4 (5th Cir. 1979) (upholding admission of directions given by an unidentified participant in a drug scheme to a "mule" because utterance is contemporaneous with an independently admissible nonverbal act and throws light upon it), cert. denied, 442 U.S. 941 (1979); *United States* v. *Annunziato*, 293 F.2d 373, 377 (2d Cir.) (similar), cert. denied, 368 U.S. 919 (1961).

despite the district court's erroneous reliance on Rule 801(d)(1)(B).[7]

Even if there were error in admitting the tapes, their admission was clearly harmless. The tapes in question were offered solely to corroborate Echols' detailed testimony on direct examination that he made regular breakfast payments to Arrington, Fowlkes, and other officials. Thus, the evidence was largely cumulative on the issue of those payments. Moreover, nothing that was said or done during the tapes implicated Paradies in the illegal payments; rather, his participation in the scheme was established entirely through other evidence. Gov't C.A. Br. 132-133.

3. In a motion to amend the petition for certiorari, filed within the period for filing a certiorari petition in this case, petitioner Paradies also challenges his conviction for conspiring to violate 18 U.S.C. 666, which prohibits corrupt payments to officials of state and local governmental agencies that receive $10,000 or more in federal financial assistance in a year. Paradies argues that Section 666 is limited in scope to corrupt payments that affect the integrity or the disbursement of federal funds. In *Salinas* v. *United States*, cert. granted, No. 96-738 (Feb. 24, 1997), one of

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[7] Petitioners argue (Pet. 24 & n.14) that, because the district court admitted the recorded statements pursuant to Rule 801(d)(1)(B), they had no occasion to request a limiting instruction concerning the use to which the statements could be put, and that they were prejudiced by the court's failure to give such an instruction. During closing argument, however, the government did not mention any of the recorded statements. Gov't C.A. Br. 128. Moreover, because the recorded statements were innocuous, there is no real possibility that petitioners were prejudiced by the lack of a limiting instruction.

the questions presented is whether Section 666 requires the government to prove that a payment to a public official would affect federal funds. If the Court grants petitioner Paradies leave to amend the certiorari petition to include that issue, then the petition should be held pending the decision in *Salinas*, and disposed of as appropriate in light of that decision.

CONCLUSION

The petition for a writ of certiorari should be denied as to the first two questions presented. On the question presented by the motion to amend the petition for a writ of certiorari, the petition should be held pending the decision in *Salinas* v. *United States*, No. 96-738, and then disposed of in accordance with that decision.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

DANIEL M. PARADIES, THE PARADIES SHOPS, INC., PARADIES MIDFIELD CORPORATION,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY FOR PETITIONERS

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REPLY FOR PETITIONERS

The government does not dispute the significance of the questions presented by the petition: whether the federal government has sufficiently clear statutory authority under 18 U.S.C. § 1346 to prosecute virtually all public corruption at the state and local levels; and what constraints exist on the admissibility of co-conspirators' prior consistent statements, which are often the government's most powerful evidence in such prosecutions. On the first question, the government largely ignores the actual language of the statute, seeking support instead in unauthoritative snippets of legislative history and in other appellate decisions that either do not squarely address the question presented here or rely on the same meager legislative history. On the second question, the government misconstrues both the opinion below and our argument. Nowhere does the government come to terms with the conflict that the opinion below creates with the decisions of this Court and other courts of appeals. Nor does the government suggest that the facts of this case make it an inappropriate vehicle for addressing the legal questions presented by the petition.[1]

1. The government has elsewhere emphasized, and does not deny here, the "exceptional importance" of the first question presented by the petition: whether Congress indicated with the requisite clarity that 18 U.S.C. § 1346, the "honest services" amendment to the mail fraud statute, was intended to reach all

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[1] By motion to amend, petitioners also raised a third question: whether 18 U.S.C. § 666, which prohibits corrupt payments to officials of state and local agencies that receive at least $10,000 in federal funds, requires the prosecution to prove that the allegedly corrupt payment would affect federal funds. That same issue is presented in *Salinas v. United States*, *cert. granted*, 65 U.S.L.W. 3505 (Feb. 24, 1997) (No. 96-738), in which certiorari was granted on February 24, 1997. The government acknowledges that, at least as to this issue, the petition should be held pending the decision in *Salinas*.

manner of "dishonesty" involving state and local officials in the conduct of their duties.[2]

The government does not contest that the Eleventh Circuit's construction of § 1346 fundamentally alters the federal-state balance by making a federal crime of conduct that historically has been prosecuted, if at all, only by the states. *See* Pet. at 14. Nor does the government suggest that § 1346, by its terms, satisfies the "plain statement" rule articulated by this Court in *United States v. Bass*, 404 U.S. 336 (1971), and its progeny — a rule that requires Congress to speak clearly and unequivocally if it intends to "render a wide range of conduct violative of federal law" that, as here, "traditionally had been regulated by state law." *Williams v. United States*, 458 U.S. 279, 290 (1982) (citing *United States v. Enmons*, 410 U.S. 396 (1973); *Bass*, 404 U.S. 336).

In *McNally v. United States*, 483 U.S. 350 (1987), this Court applied this "plain statement" rule to a public corruption prosecution much like this one. The Court explained that if Congress intended, through the federal mail fraud statute, to set and enforce "standards of disclosure and good government for local and state officials," it must "speak more clearly than it ha[d]" up to that time. *Id.* at 360; *see id.* at 361 n.9 (refusing to construe existing mail fraud statute to reach otherwise lawful conduct of state and local officials absent "a much clearer indication" of congressional intent).

In the wake of *McNally*, the Department of Justice proposed an amendment to the mail fraud statute that explicitly would have proscribed schemes to deprive the citizenry of the honest services of state and local officials.[3] The Senate adopted the provision,

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[2] Suggestion of the United States for Rehearing *En Banc*, *United States v. Brumley*, 79 F.3d 1430 (5th Cir. 1996).

[3] In introducing this proposal, Acting Assistant Attorney General John Keeney (counsel for the government in this case) explained the Justice Department's view "that any legislative response [to *McNally*] must be

but the House of Representatives did not. Instead, Congress enacted § 1346, a single sentence that contains no expression of intent, much less a clear one, to intrude into what traditionally has been the domain of state and local government.

2. The arguments that the government *does* advance in its opposition do not undercut the need for this Court to review the § 1346 issue in this case. In the face of the undeniable fact that Congress chose not to adopt the Senate alternative to § 1346 that expressly would have reached dishonesty by state and local officials, the government speculates that the House "*may* . . . have found [the Senate language] too narrow in that it *may* have reached only corruption involving public officials, and not schemes to deprive private employers or organizations of their right to honest services by their officials and agents." Opp. at 10 (emphasis added). However, whether or not such speculation as

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carefully tailored to the problems created by *McNally*." *Fraud Amendments Act of 1987: Hearing on H.R. 3089 & H.R. 3050, Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 100th Cong., 2d Sess. 9 (1988) [hereinafter "House Hearing"]. The Justice Department took the position that a House bill, which (similar to § 1346) would have defined "fraud" to include defrauding another "of intangible rights of any kind whatsoever in any manner for any purpose whatsoever," H.R. 3089 § 2(a), "would not eliminate gaps which exist in current law and which make it difficult for prosecutors to successfully bring public corruption cases." House Hearing, *supra*, at 9.

In contrast, the Justice Department's own legislation, which was designed to "respond[] directly to those concerns expressed by the Supreme Court in *McNally*," "explicitly focused on corruption and dishonest conduct in government at the State and local as well as the Federal levels." *Id.* at 9, 10. Recognizing that "*McNally* was predicated upon the concern that the expansive use of the mail fraud statute resulted in the exercise of federal jurisdiction over conduct not clearly authorized by Congress," the Justice Department asserted that its proposed legislation was necessary to "address both the problems created by *McNally* and be assured that the new statute can withstand judicial scrutiny." *Id.* at 19, 21.

to Congress's motive has any basis in fact, the *Bass* "plain statement" rule remains unsatisfied. The government does not, and cannot, demonstrate that Congress "has in fact faced, and intended to bring into issue," whether to "effect a significant change in the sensitive relation between federal and state criminal jurisdiction." *Bass*, 404 U.S. at 349.

In a further attempt to justify reading language into § 1346 that Congress declined to put there, the government asserts that unenacted alternative legislation is "'unpersuasive evidence.'" Opp. at 10 (quoting *United States v. Frega*, 933 F. Supp. 1536, 1545 (S.D. Cal. 1996)). But this Court thought otherwise in *Jerome v. United States*, 318 U.S. 101 (1943). In that case, the Court rejected the government's argument that a state law felony could constitute a predicate offense under the federal bank robbery statute. The Court found it significant that, as in this case, a bill proposed by the Justice Department that would have expressly incorporated state law crimes had been adopted by the Senate but rejected in the House. *Id.* at 102-03. The Court reasoned that, because "the administration of criminal justice under our federal system has rested with the states, except as criminal offenses have been explicitly prescribed by Congress," any such "expansion of federal criminal jurisdiction should hardly be left to implication and conjecture." *Id.* at 105-06. The same rule should apply to § 1346.

3. In the absence of any support for its position in the statutory text, the government rests its argument on two isolated statements in the legislative history. *See* Opp. at 7-9 & n.2. The government does not even attempt, however, to justify why these statements should be accorded any significant weight. *See Atascadero State Hosp. v. Scalon*, 473 U.S. 234, 242 (1985) (federalism interests protected by plain statement rules require proof of congressional intent "in the language of the statute").

The government relies primarily on a lengthy floor statement by Representative Conyers. The government infers that § 1346 applies to dishonesty involving state and local officials because Representative Conyers, after referring to congressional hearing

testimony that the *McNally* decision had interfered with public corruption prosecutions, stated that "[t]his amendment is intended merely to overturn the *McNally* decision." Opp. at 8 (quoting 134 Cong. Rec. 33,296-33,297 (1988).[4] At most, however, Representative Conyers' remarks indicate that he personally believed that § 1346 would reach dishonesty involving state and local officials. *See Dennis v. Higgins*, 498 U.S. 439, 443 n.4 (1991) (statements of individual legislators cannot overcome plain statement requirement). It would be particularly inappropriate to attribute Representative Conyers' statement to the full Congress given that he voted *against* the final bill, that he did not purport to be presenting anything other than his personal views, and that not even one other member of Congress endorsed, opposed, or expressed any awareness of the statement. Pet. at 12 & n.7.

Similarly, the post-enactment report invoked by the government in a footnote (*see* Opp. at 9 n.2) addressed § 1346 in only three sentences and reflected only Senator Biden's personal views. The report did not purport to present the views of the Senate Judiciary Committee, which never considered either the version of § 1346 that Congress enacted or the report itself. *See United States v. Brumley*, 79 F.3d 1430, 1436, *reh'g en banc granted*, 91 F.3d 676 (5th Cir. 1996). In any event, such "post-passage remarks of legislators, however explicit, cannot serve to change the legislative intent of Congress expressed before the Act's passage"; instead, they "'represent only the personal views of these legislators since the statements were made after passage

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[4] The government does not, however, embrace all of Representative Conyers' statement. In remarks that the government omits from its quotation, Representative Conyers also referred to testimony that *McNally* had interfered with prosecutions of election fraud. 134 Cong. Rec. 33,296-33,297 (1988). Thus, under the government's reasoning here, because § 1346 was enacted to solve the problems created by *McNally*, § 1346 should be construed to reach election fraud as well. But the Department of Justice has for years disavowed any such construction of § 1346. *See, e.g.*, 138 Cong. Rec. S6663, S6666 (May 14, 1992).

of the Act.'" *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 132 (1974) (quoting *National Woodwork Mfr. Ass'n v. NLRB*, 386 U.S. 612, 639 n.34 (1967)); *accord Sullivan v. Finkelstein*, 496 U.S. 617, 631-32 (1990) (Scalia, J., concurring).

4. The government finally asserts that many circuits have endorsed the expansive construction of § 1346 adopted by the Eleventh Circuit in this case. Opp. at 10-11. Many of the cases cited by the government do not, however, even involve public corruption prosecutions under § 1346.[5] None of them addressed whether, in light of the "plain statement" rule of *Bass* and its progeny, § 1346 may be construed to reach dishonesty involving state and local officials. The only appellate panel to focus on that question concluded that the statute could not be so construed. *See Brumley*, 79 F.3d 1430 (§ 1346 cannot properly be construed to reach dishonesty involving state and local officials).

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[5] Six of the cases do not involve public officials at all, and thus could not have "definitively addressed" whether § 1346 reaches public corruption. *United States v. Catalfo*, 64 F.3d 1070, 1072-76 (7th Cir. 1995) (options trading scam at Chicago Board of Trade), *cert. denied*, 116 S. Ct. 1683 (1996); *United States v. DeFries*, 43 F.3d 707, 708 (D.C. Cir. 1995) (labor union vote fraud); *United States v. Thomas*, 32 F.3d 418, 419 (9th Cir. 1994) (fruit broker secretly averaging prices); *United States v. Holley*, 23 F.3d 902, 905-07 (5th Cir.) (savings and loan shenanigans), *cert. denied*, 513 U.S. 1043 (1994); *United States v. Ames Sintering Co.*, 927 F.2d 232, 233-34 (6th Cir. 1990) (rigging of bid to private company); *United States v. Martinez*, 905 F.2d 709, 710-11 (3d Cir.) (fraud to procure medical license), *cert. denied*, 498 U.S. 1017 (1990). Moreover, in eight of the cases, the defendant was not even charged under § 1346, again making it impossible for those courts definitively to address § 1346's scope. *Catalfo*, 64 F.3d at 1072; *DeFries*, 43 F.3d at 708; *Thomas*, 32 F.3d at 419; *Holley*, 23 F.3d at 907; *United States v. Dischner*, 974 F.2d 1502, 1506 (9th Cir. 1992), *cert. denied*, 507 U.S. 923 (1993); *Ames Sintering Co.*, 927 F.2d at 234; *United States v. Granberry*, 908 F.2d 278, 279 (8th Cir. 1990), *cert. denied*, 500 U.S. 921 (1991); *Martinez*, 905 F.2d at 11-12.

Moreover, as the government acknowledges, this Court granted certiorari and subsequently reversed in *McNally*, even though "every court of appeals that had addressed the issue had held that the mail and wire fraud statutes reached public corruption." Opp. at 6. The number of appellate decisions applying § 1346 only confirms that the question presented here, like the similar question in *McNally* itself, is one of "exceptional importance" and that no purpose would be served by allowing it to percolate in the circuits any longer.

5. As for the second issue raised in the petition, the government ignores our two legal arguments regarding the admissibility of the so-called "Echols tapes" — tape-recorded statements of the government's principal witness, Harold Echols, made after he began to cooperate with the government. The government thus does not dispute that a split exists among the courts of appeals over the admissibility, for rehabilitative purposes, of a prior consistent statement made after the witness had a motive to lie. *See* Pet. at 17-19. Nor does the government dispute that the circuits are also divided over the circumstances in which a court of appeals may affirm the admission of evidence on a ground narrower than that relied on by the trial court. *See* Pet. at 23-25. The government likewise does not deny the importance of either issue.

Instead, the government argues only that we have "misconstrue[d] the basis for the court of appeals' decision upholding the admission of the tapes." Opp. at 11. The government notes that the court of appeals concluded that the tapes were not, as the district court had held,[6] admissible for their

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[6] The government confuses the issue by suggesting (Opp. at 13) that the tapes were not offered at trial for their truth. The trial court squarely held that the tapes were admissible under Rule 801(d)(1)(B), "thereby permitting their introduction as substantive evidence." Order, *United States v. Jackson*, No. 1:93-cr-310 (Apr. 15, 1994), at 33. The court of appeals recognized that "[t]he district court found that the tapes were admissible under Fed.R. Evid. 801(d)(1)(B)." Pet. at 43a.

truth; rather, the tapes were admissible only for certain more limited purposes, such as "to corroborate Echols' testimony on direct examination that he routinely made . . . bribes to [public officials]." Opp. at 13.

The government's argument misses the point. We never suggested that the court of appeals held the Echols tapes to be admissible as substantive evidence. Nor could the court have done so consistent with *Tome v. United States*, 115 S. Ct. 696 (1995). Our argument is that the court of appeals acted erroneously, and contrary to other circuits, in affirming the admission of the tapes even for these limited purposes.

First, the court of appeals erred because, under the common-law relevance rule, a witness's prior consistent statements, if made after he had a motive to lie, are not admissible to "rehabilitate" him. *See Tome*, 115 S. Ct. at 700. That is because such "post-motive" statements are not considered reliable evidence of the witness's truthfulness. A number of circuits have held that this common-law relevance rule survived the promulgation of the Federal Rules of Evidence. *See* Pet. at 18-19 (citing cases). If that is so, then the Echols tapes were inadmissible, hearsay or not. The common-law relevance rule would preclude the admission of the tapes "to rehabilitate Echols," as the court of appeals put it (Pet. at 44a) — or, similarly, as the government puts it here, to "corroborate" his testimony after his credibility was challenged on cross-examination (Opp. at 13).

Second, the court of appeals also erred in holding that the trial court's erroneous admission of the tapes did not require reversal of Mr. Paradies' conviction, so long as the trial court could properly have admitted the tapes for some more limited purpose (*e.g.*, rehabilitation). In order to sustain a conviction in these circumstances, the court was also required to assess whether Mr. Paradies was prejudiced by the erroneous admission of the tapes for all purposes at trial, rather than only for the limited purposes sanctioned on appeal. This sort of assessment clearly is required

by *Shepard v. United States*, 290 U.S. 96 (1933), and its progeny. *See* Pet. at 23-25.

It cannot be assumed that, as the government asserts (Opp. at 16 n.7), Mr. Paradies was not prejudiced by the jury's erroneous consideration of the tapes for their substance, without any limiting instruction. The tapes include, for example, a statement to the effect that Mr. Paradies had exercised his Fifth Amendment privilege not to testify before the grand jury. Pet. App. at 42a. That statement alone presents a strong case for a finding that the introduction of the tapes was prejudicial.[7]

6. The government has not opposed our motion to amend the petition to add a third question: whether 18 U.S.C. § 666 requires the government to prove that a bribe to a public official implicates federal funds. As the government acknowledges (Opp. at 16-17), this question is currently pending before this Court in *Salinas v. United States*, *cert. granted*, 65 U.S.L.W. 3505 (Feb. 24, 1997) (No. 96-738). We agree that the Court appropriately may hold this petition pending its decision in *Salinas*.

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[7] The trial transcript flatly contradicts the government's assertion, moreover, that "nothing that was said or done during the tapes implicated Paradies in the illegal payments." Opp. at 16. For example, in a transcript of a telephone conversation that the government read to the jury, Mr. Echols stated that Mr. Paradies "was supposed to help me out" with a $5,000 payment to a public official. Tr. 2279.

While the government notes that we have focused on certain of these statements only in this Court (*see* Opp. at 14 n.5), the government does not argue that we waived our right to do so. Nor would any such argument be justified. The statements do not constitute a legal claim or an assertion of error; instead, they are factual support for our argument, raised at all stages of the case, that admission of the tapes was erroneous and prejudicial.

CONCLUSION

The petition for a writ of certiorari should be granted as to the first two questions presented. As to the question presented by the motion to amend the petition, the Court should hold the petition pending its decision in *Salinas v. United States*, No. 96-738.

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SUPPLEMENTAL BRIEF FOR PETITIONERS

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STATEMENT

Petitioners Daniel M. Paradies, The Paradies Shops, Inc., and Paradies Midfield Corporation file this supplemental brief pursuant to Supreme Court Rule 15.8 to inform this Court of a legal development subsequent to the filing of their papers in this case. At the time that petitioners submitted their petition for writ of certiorari and reply brief, one of the cases cited in those briefs, *United States v. Brumley*, 79 F.3d 1430 (5th Cir. 1996), had been argued to the Fifth Circuit *en banc* but had not been decided. On June 18, 1997, the Fifth Circuit announced its *en banc* decision in *Brumley*, reversing the panel opinion. The *en banc* opinion is reported at 116 F.3d 728 (1997), *petition for cert. filed* (U.S. Sept. 15, 1997) (No. 97-486).

The defendant in *Brumley* was convicted of mail fraud for "conspiring to defraud the citizens of the State of Texas of honest services." 116 F.3d at 730. The Fifth Circuit panel reversed the conviction, holding that Congress' 1988 enactment of § 1346 did not encompass state or local citizens who had been "deprived of the honest services of their public officials." *Id.* at 730 (citing *Brumley*, 79 F.3d at 1441-42). The *Brumley en banc* majority disagreed with this panel holding.

Judge Higginbotham's opinion for the *en banc* majority concluded that Congress intended in 1988 to overturn this Court's decision in *McNally v. United States*, 483 U.S. 350 (1987), by passing 18 U.S.C. § 1346. The majority limited its holding, however, by noting that a prerequisite to an "honest services" conviction is that the "official must act or fail to act contrary to the requirements of his job under state law." *Id.* at 734. This prerequisite was met in *Brumley* because the district court had found a violation of the Texas penal code. *Id.* at 735-36.

Judges Jolly and DeMoss, joined by Judge Smith, dissented from what they deemed "an issue-evasive and jurisprudentially flawed majority opinion." *Id.* at 736. They argued that both *McNally* and *Carpenter v. United States*, 484 U.S. 19 (1987), when read in conjunction with the principle of lenity and this Court's federalism jurisprudence, required that Congress be "unmistakably clear in the language of the statute" if it wished to

criminalize conduct traditionally reserved for state criminal laws. *Id.* at 740. In the dissent's view, § 1346 failed to meet this standard because, on its face, it "produce[d] numerous ambiguities and questions." *Id.* at 740. Moreover, the legislative history of § 1346 illustrated that Congress indeed knew "how to 'speak clearly and definitively'" but chose not to do so. *Id.* at 745.

DISCUSSION

1. As explained in the petition, certiorari should be granted to decide the § 1346 issue because the decision below is "inconsistent with *McNally v. United States* and other applicable decisions of this Court." Pet. at 6. *McNally* requires that Congress speak with special clarity when it proposes to alter the federal-state balance in the area of criminal law. Congress did not do so when it enacted § 1346. Regardless of whether the decision conflicts with *Brumley* or any other court of appeals decision, the issue whether § 1346 legislatively overruled *McNally* is one of critical importance that must be decided by this Court. Indeed, in *McNally* itself, the Court granted review in the absence of a circuit conflict and reached a result contrary to the unanimous weight of circuit court authority. *See McNally*, 483 U.S. at 364 (Stevens, J., dissenting). The *Brumley en banc* opinions confirm that this is a significant and substantial issue on which reasonable judges can and do disagree. *See, e.g.*, 116 F.3d. at 742, 746 (dissenting opinion) (accusing majority of an "egregious error," finding majority's conclusion "incomprehensible," and noting that the majority "closed [its] eyes to obvious ambiguities in the text of 28 U.S.C. § 1346"). If, as petitioners contend, § 1346 did *not* overrule *McNally*, then it is critical for this Court to resolve that issue now and put a stop to inappropriate prosecutions.

2. Moreover, while there is no longer the same disagreement between *Brumley* and the decision below that existed at the time that the petition was filed, the analyses of the Fifth and Eleventh Circuits remain in conflict with respect to the reach of § 1346. Although the *Brumley en banc* majority held that Congress had overruled *McNally* when it enacted § 1346, it still felt compelled

— based on concerns of federalism — to impose substantial limits on the scope of § 1346 to prevent the federal government from "impos[ing] upon states a federal vision of appropriate services — to establish, in other words, an ethical regime for state employees." 116 F.3d at 734. Accordingly, the *en banc* court held that "a federal prosecutor must prove that conduct of a state official breached a duty respecting the provision of services owed to the official's employer under state law." *Id.*[1]

By contrast, the courts below recognized no such limitation. The government alleged that petitioners had aided and abetted the mail fraud of defendant Ira Jackson, who was alleged to be a fiduciary of the City of Atlanta. *See* Pet. App. at 26a. In its jury instructions, the trial court stated that "a fiduciary's duty to disclose material information to his principal need not be created by local, state or federal law." (R48-4256). This approach — which led to petitioners' convictions — cannot be reconciled with the more restrictive reading of § 1346 adopted in *Brumley*. Nor can it be reconciled with *McNally* itself. As petitioners have argued (Pet. at 15), in *McNally* this Court specifically identified the situation involving state or local officials who are not accused of violating state law as requiring "a much clearer indication" from Congress before such defendants could be subject to federal prosecution. *McNally*, 483 U.S. at 361 n.9.

Thus, this case presents this Court with the opportunity to determine not only whether Congress intended to overrule *McNally* by enacting § 1346, but also (if the Court rejects petitioners' contention that Congress did not so intend) to clarify the permissible scope of prosecution under § 1346. *See* Pet. 6 & n.2, 12. The *Brumley en banc* opinions only confirm that these issues are important and should be resolved by this Court.

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[1] The *Brumley* majority noted that the defendant's conduct constituted a Texas criminal offense and that the district court had found a violation of the Texas penal law. *Id.* at 735-36.

CONCLUSION

For the foregoing reasons and those given in the petition and reply brief, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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No. 96-1346

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

DANIEL M. PARADIES, THE PARADIES SHOPS, INC., PARADIES MIDFIELD CORPORATION,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

SECOND SUPPLEMENTAL BRIEF FOR PETITIONERS

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STATEMENT

Petitioners Daniel M. Paradies, The Paradies Shops, Inc., and Paradies Midfield Corporation file this supplemental brief pursuant to Supreme Court Rule 15.8 to inform this Court of the impact of two developments that occurred subsequent to the filing of their papers in this case.

DISCUSSION

1. On December 2, 1997, this Court decided in *Salinas v. United States*, No. 96-738 (Dec. 2, 1997), that the federal bribery statute, 18 U.S.C. § 666(a)(1)(B), does not require the government to prove that the bribe in question had "any particular *influence* on federal funds." *Salinas*, slip op. at 9 (emphasis added). The Court specifically left open, however, the issue of "whether [§ 666] requires some other kind of connection between a bribe and the expenditure of federal funds," noting that in *Salinas* "the bribe was related to the housing of a prisoner in facilities paid for in significant part by federal funds themselves." *Id.* at 6.

Here, the government's bribery theory involved airport concessions, but the government did not prove that those concessions received any federal funds. Instead, the government contended that it was sufficient to show that the City of Atlanta as a whole received such funds, and the district court, over defendants' objection, instructed the jury to that effect. On appeal, defendants argued that this nexus was insufficient, but the Eleventh Circuit felt that it did not need to address that issue because of the wording of the statute. *United States v. Paradies*, Pet. App. 37a-39a, *quoting United States v. Westmoreland*, 841 F.2d 572, 576 (5th Cir.), *cert. denied*, 488 U.S. 820 (1988). By taking that approach, the Eleventh Circuit ignored an issue that this Court in *Salinas* recognized could be significant to the analysis under § 666. This case underscores the importance of the issue left open in *Salinas*: if the only nexus required is that a municipality receive in excess of $10,000 in federal funds, then the nexus requirement would be rendered meaningless. Thus, this Court should give the Eleventh Circuit the opportunity to reexamine its ruling in light of *Salinas*. *See Henry v. Rock Hill,*

376 U.S. 776, 777 (1964) (discussing grounds for granting, vacating, and remanding pending petition for certiorari).

2. Petitioners learned on December 2, 1997, that the petition for a writ of certiorari in *Brumley v. United States*, No. 97-486, is set for conference on December 12, 1997. That petition asks this Court to review and reverse the decision by the United States Court of Appeals for the Fifth Circuit in *United States v. Brumley*, 116 F.3d 728 (5th Cir. 1996) *(en banc)*. The *Brumley* petition raises issues relating to 18 U.S.C. § 1346 that mirror the first question presented in the petition here. The *en banc* Fifth Circuit in *Brumley* found that Congress had overruled *McNally v. United States*, 483 U.S. 350 (1987), by passing 18 U.S.C. § 1346. *Brumley*, 116 F.3d at 730. Nevertheless, in conflict with the Eleventh Circuit's decision here, the *en banc* Fifth Circuit ruled that a federal prosecutor seeking a conviction under § 1346 "must prove that conduct of a state official breached a duty respecting the provision of services owed to the official's employer under state law." *Id.* at 734.

Under these circumstances, petitioners believe that the Court should consider *Brumley* and this case in the same conference, since both petitions present the Court with the opportunity to clarify the scope of prosecution under § 1346. Alternatively, were the Court inclined to deny certiorari in this case and in *Brumley*, if it GVR'ed this case based upon *Salinas*, *see supra*, the Eleventh Circuit would have the opportunity not only to consider the federal funds issue, but also to reexamine its analysis of the mail fraud issue in light of the *en banc* Fifth Circuit *Brumley* decision.

CONCLUSION

For the foregoing reasons and those given in the petition, reply brief and supplemental brief of September 30, 1997, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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